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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER
CIRCLE, INC.,
Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of
Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY
VINTNERS ASSOCIATION,
Respondents.

*On Petition For A Writ Of
Certiorari To The Supreme Court Of California*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1986, the federal government, which regulates the labeling of alcoholic beverages to "prohibit deception of the consumer," 27 U.S.C. §205(e)(1), issued a rule generally prohibiting wineries from adopting new brand names containing geographic terms, unless the wine originates in the place referenced in the brand. The rule, however, expressly authorized the continued use of already-existing geographic brands for wines originating elsewhere, provided the label features an "appellation of origin" or some other statement "sufficient to dispel" any misimpression about the wine's origin. 27 C.F.R. §4.39(i)(2). Petitioners are authorized by this rule, and by a series of specific federal label permits, to use the pre-1986 brand names "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners" on wines from a variety of California regions. In 2000, however, the California Legislature, dissatisfied with the federal policy, enacted a law forbidding petitioners from using these brands except on Napa County wines. The questions presented are:

1. Whether the Supremacy Clause preempts a state law that prohibits conduct expressly authorized by federal rule and federal permits.

2. Whether a state law that conflicts with federal law nonetheless is entitled to a "strong presumption against preemption" because it addresses a subject historically regulated by the states and because federal regulation of the field was not "manifest since the beginning of our Republic."

3. Whether wine labels that federal regulators have specifically approved as not misleading may be deemed "inherently misleading" and without First Amendment protection because a state legislature, disagreeing with federal regulators, considers them deceptive.

**LIST OF PARTIES TO THE PROCEEDING IN THE
CALIFORNIA SUPREME COURT**

Petitioners:

Bronco Wine Company
Barrel Ten Quarter Circle, Inc.

Respondents:

Jerry R. Jolly, Director of the California
Department of Alcoholic Beverage Control
The California Department of Alcoholic
Beverage Control

Intervenor:

Napa Valley Vintners Association

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns more than
10% of the stock of either of petitioners Bronco Wine
Company or Barrel Ten Quarter Circle, Inc.

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OPINIONS BELOW

The decision of the California Supreme Court (App. 1a-71a), as modified on petition for rehearing, is published at 33 Cal. 4th 943, 95 P.3d 422, 17 Cal. Rptr. 3d 180 (2004). The order of the California Supreme Court denying petitioners' petition for rehearing and modifying that Court's original opinion (App. 165a-169a) is unpublished. The California Supreme Court's decision reversed a decision of the California Court of Appeal (App. 129a-164a) published at 128 Cal. Rptr. 2d 320 (2002). The California Court of Appeal's decision on remand (App. 72a-128a) is published at 129 Cal. App. 4th 988, 29 Cal. Rptr. 3d 462 (2005). The Court of Appeal's order denying petitioners' request for rehearing (App. 170a-171a) was certified for publication. The California Supreme Court's order denying a Petition for Review (App. 172a) is unpublished.

JURISDICTION

The California Supreme Court, on August 24, 2005, denied review of the Court of Appeal's decision on remand (App. 172a), which resolved all remaining federal issues. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at pp. 173a-186a.

STATEMENT OF THE CASE

A. The Federal Regulatory Framework.

Congress enacted the Federal Alcohol Administration Act of 1935 ("FAAA") "to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages." 27 U.S.C. §203. The FAAA and the regulations thereunder comprise a set of "national rules governing the distribution,

production, and importation of alcohol.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995).

The FAAA gives regulatory authority over the labeling of alcoholic beverages to the Secretary of Treasury and his delegate, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”).¹ The statute requires TTB to promulgate labeling regulations that will “prohibit deception of the consumer” and “provide the consumer with adequate information as to the identity and quality of the products.” 27 U.S.C. §205(e)(1)-(2). Wine labeling regulations are set forth in 27 C.F.R. Parts 4, 9, and 12, and regulations specifically pertaining to deceptive wine labeling include 27 C.F.R. §§4.30(a), 4.33(b), 4.38a(a), and 4.39(a)(1).

The FAAA also requires the government to review all alcoholic beverage labels used in interstate and foreign commerce to ensure compliance with all pertinent regulations, including those pertaining to deception. *See* 27 U.S.C. §205(e). Thus, labeling “specialists” at TTB review *every* new product label “on a case-by-case basis to determine whether any particular label is likely to mislead consumers, including as to the origin of the product” or otherwise fails to conform to federal regulations. 66 FED. REG. 29,476, 29,478 (May 31, 2001); *see* 27 C.F.R. §§4.30, 4.50, 13.21(a). Upon determining that a label comports with these requirements, TTB issues a certificate of label approval (“COLA”) expressly authorizing use of that label.² No alcoholic beverage may be shipped or sold in interstate or foreign commerce unless it bears a label thus approved. 27 U.S.C. §205(e); 27 C.F.R. §4.50.

¹*See* 27 U.S.C. §§205(e), 215; 27 C.F.R. Parts 4, 5, 7, 9, 12, 13, and 16. TTB is the recent successor to the Bureau of Alcohol, Tobacco and Firearms (“BATF”). *See* 68 FED. REG. 3744 (Jan. 24, 2003). The opinions below refer collectively to both agencies as the BATF.

²*See* 27 C.F.R. §4.50. The issuance or denial of a COLA is a final, appealable agency action, and the revocation or cancellation of a COLA is subject to due process. *See* 27 C.F.R. §§13.41-45.

B. Federal Regulation Of Geographic Brand Names.

TTB regulations require all wine labels to bear a brand name. 27 C.F.R. §4.32(a)(1). Wine brands frequently contain geographic terms that may refer to the location of the winery or where the grapes were grown, or may be entirely fanciful. For decades, geographic wine brands were generally permitted, but unless a wine was made from grapes grown in the place referenced in the brand, TTB also required the label to bear an "appellation of origin" (one of a class of approved designations of winegrape-growing regions) or some other terminology sufficient to dispel any erroneous impression the brand might give about the wine's origin. See 49 FED. REG. 19,330, 19,331 (May 7, 1984) (history of regulation of geographic wine brands); see generally 27 C.F.R. §§4.25, 4.34(b) (appellations of origin).

In 1986, TTB issued a new regulation on geographic brands, which remains in force today. 27 C.F.R. §4.39(i). Under the regulation, geographic brand names adopted after the regulation's effective date (July 7, 1986) "may not be used unless the wine meets the appellation of origin requirements for the geographic area named." *Id.* Brand names used in labels approved by TTB *before* that date, however, may continue to be used under any of three conditions (*id.*):

- (i) The wine shall meet the appellation of origin requirements for the geographic area named; or
- (ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either: (A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or; (B) A state, county or a viticultural area, if the brand name bears a state name; or
- (iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

In the *Federal Register* notice publishing this rule, TTB noted that, over the course of the rulemaking, it had considered adopting an unqualified rule restricting all geographic brand names, including established brands, to wines from the region referenced in the brand, but had concluded that such a rule would be too restrictive. *See* 51 FED. REG. 20,480, 20,482 (June 5, 1986); 49 FED. REG. at 19,331. TTB explained that the distinction between new brands and established brands would "provide industry with sufficient flexibility in designing their labels, *while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names.*" *See* 51 FED. REG. at 20,482 (emphasis added). In reaching this conclusion, the agency relied on its own experience as well as evidence in the rulemaking record that existing geographic brand names had developed a significant following among consumers, who understood that the brand names did not identify the wine's origin. *See* 51 FED. REG. at 20,481. A 2001 *Federal Register* notice reiterated TTB's view that an appellation of origin will dispel any confusion that an established geographic brand otherwise might cause.³

C. California's "Napa Brand" Statute.

Although Respondent Napa Valley Vintners Association ("NVVA") did not oppose 27 C.F.R. §4.39(i) when it was published for comment, the trade association has since lobbied TTB, without success, to eliminate or phase out the rule's grandfathering provision. *See* 51 FED. REG. at 20,480; PA 469-72.⁴ In 2000, the NVVA redirected its

³*See* 66 FED. REG. 29,476. In that notice, TTB recognized a new California viticultural area called "Santa Rita Hills" despite the existence of a popular Chilean wine sold under the brand name "Santa Rita." TTB concluded that continued use of the brand would not be confused with the new viticultural area, as long as a suitable Chilean appellation of origin appeared on the label. *See* 66 FED. REG. at 29,478.

⁴"PA" refers to the Appendix to the Petition for Writ of Mandate filed by petitioners in the California Court of Appeal.

efforts at the California Legislature, which proved more pliant. See PA 415, 469, 477. The NVVA persuaded members of the Legislature that the grandfather clause contained in 27 C.F.R. §4.39(i) was a pernicious "loophole" that, given TTB's inaction, should be closed by the Legislature. App. 6a; see, e.g., RA 1 (statement of Assemblywoman Wiggins); *id.* at 16 (statement of Sen. Chesbro).⁵

The resulting legislation, California Business and Professions Code Section 25241, prohibits wine "produced, bottled, labeled, offered for sale, or sold" in California from bearing "in a brand name or otherwise" the word "Napa" or the name of any federally recognized viticultural area within Napa County (such as Rutherford or Stag's Leap), unless at least 75% of the wine is made from grapes grown in Napa County. CAL. BUS. & PROF. CODE §25241(b)-(c) (incorporating 75% content requirement set forth in 27 C.F.R. §§4.25(a)(1); 4.25a(b)(1)(i)); see 27 C.F.R. Part 9 (listing federally recognized viticultural areas). Section 25241 does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area *within* Napa, such as the brand "Stag's Leap Wine Cellars," for wine made with grapes grown *outside* the Stag's Leap District but within Napa County.⁶ Because Section 25241 applies to wine "produced" or "bottled" in California but exported from the state for sale to consumers elsewhere, it effectively prohibits interstate and foreign shipments or sales of wines bearing proscribed brand names, regardless whether

⁵"RA" refers to the Appendix filed by Respondents California Department of Alcoholic Beverage Control and its Director in the California Court of Appeal.

⁶App. 8a n.8. The statute was written this way to permit influential members of the NVVA to continue using their geographic brands as they had done before. See RA 51.

TTB authorized the use of those brands in 27 C.F.R. §4.39(i) and individual COLAs. *See* App. 5a n.6.

D. Bronco's Brands And Labels.

Petitioner Bronco Wine Company ("Bronco"), a California wine producer with winery facilities in Northern California, produces a variety of moderately-priced California wine brands, which it sells throughout the country and the world. *See* PA 185, 187, 222-68; App. 2a. Petitioner Barrel Ten Quarter Circle bottles some of Bronco's brands under contract at its winery in Napa, California. *See* App. 2a. Three of those brands—"Napa Ridge," "Rutherford Vintners" and "Napa Creek Winery"—are covered by Section 25241. These brands have been in existence since well before 1986 and have long been used by Bronco and its predecessors with both Napa and non-Napa wines. App. 3a, 82a; *see also* PA 410.

Under 27 C.F.R. §4.39(i)(2), petitioners are authorized to use each of these "grandfathered" brands in interstate and foreign commerce for wines made from grapes grown in areas other than the places named in the brands, as long as the label also contains a conspicuous appellation of origin or some other statement "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." It is undisputed that the labels comply with this regulation. *See* App. 1a, 7a. Indeed, Bronco's labels contain *both* an appellation of origin on the front label *and* additional statements about the wine's origin on the back label, such as, "Our barrel select Merlot grapes ripened to perfection in carefully tended vineyards in California's celebrated Lodi viticultural area." PA 203. Moreover, TTB has issued a COLA for every one of Bronco's labels containing any of the effected brands. *See* App. 73a; RA 13-14, 855, 864-69, 870-74, 876-77, 953, 1282, 1330, 1401. These COLAs represent "case-by-case" determinations as to whether, *inter alia*, "the labels are likely to mislead consumers, including as to the origin of the

product.” 66 FED. REG. at 29,478. The use of all such labels, however, is prohibited by California’s Section 25241, just as the California Legislature intended.

E. The Proceedings Below.

Before Section 25241’s effective date, petitioners initiated proceedings in the California Court of Appeal to challenge the law’s constitutionality. App. 129a; *see* App. 8a n.9. Petitioners argued that, as to wine destined for sale in interstate and foreign commerce, Section 25241 is preempted by both 27 C.F.R. §4.39(i)(2)(ii) and the federal COLAs approving Bronco’s labels. App. 131a-32a. Petitioners also asserted a claim under the First Amendment, among other constitutional provisions. *See id.* The NVVA intervened to join California’s Department of Alcoholic Beverage Control in defending the statute. App. 9a.

The Court of Appeal held Section 25241 preempted because the statute “prohibits precisely that which the federal law permits,” App. 132a, namely, the use of Bronco’s grandfathered brands and approved labels in interstate and foreign commerce. The court rejected the contention that Section 25241 enjoys a “presumption against preemption” because it arose in “an area traditionally occupied by the states.” App. 147a. The court reasoned that, when “Congress acts within an area delegated to it under the Constitution” and state law “directly conflicts” with that federal law or regulations pursuant thereto, no “presumption” can save the state law from invalidation. App. 147a-48a. The court did not reach petitioners’ other constitutional claims. *See* App. 131a n.3.

On review, the California Supreme Court reversed. App. 1a. The California Supreme Court devoted much of its analysis to the burden of proof. App. 11a-59a. Citing decisions of this Court, the California Supreme Court held that “a strong presumption against preemption applies” in this case, because “the protection of consumers from potentially misleading brand names and labels of food and

beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states.” App. 14a. The court deemed the presumption applicable despite the long history of federal regulation of this field, because (according to the court) that history did not date back to “the beginning of our Republic.” *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 99 (2000)).

The court also held that, to overcome the presumption against preemption, Bronco would have to show a “clear or manifest intent on the part of Congress, or congressional intent as interpreted by the TTB, to preempt the traditional exercise of state police power such as the wine labeling regulation found in section 25241.” App. 59a; *see id.* at 11a-12a, 38a. The court examined the FAAA, its legislative history, and its historical context and found no such preemptive intent on the part of Congress, *see id.* at 38a-43a, 58a-59a, or TTB, *see id.* at 43a-58a. The court thus determined to “proceed under the presumption that no such preemption was intended” and to “bear this presumption in mind when we consider below Bronco’s assertion that section 25241, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.” *Id.* at 59a.

Turning to the substance of petitioners’ preemption claim, the California Supreme Court conceded that a federal statute, regulation, license, or permit authorizing certain activity can preempt a state’s prohibition of that activity. App. 64a. The court, however, did not consider 27 C.F.R. §4.39(i) to constitute such an authorization:

There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful. In our view it is more accurate to characterize the state statute as prohibiting—with respect to Napa County—what the federal regulation’s grandfather clause *does not prohibit*.

App. 64a (internal quotations and citations omitted). As for the COLAs, the court did not consider them “a license or

permit as understood in” this Court’s preemption decisions. App. 69a. Accordingly, the California Supreme Court reversed the Court of Appeal’s holding that Section 25241 is preempted by federal law and remanded the case for disposition of petitioners’ remaining claims. App. 71a.⁷

The Court of Appeal rejected petitioners’ remaining claims. App. 129a. With respect to the First Amendment claim, the court held (App. 83a):

[A] brand name of geographic or viticultural significance conveys information about the geographic source of the grapes used to make the wine. For that reason a brand name is entitled to First Amendment protection as commercial speech only if the information about the source of the wine is accurate. To the extent a brand name of geographic significance is more likely to deceive the public than to inform it because it is suggestive of a false or misleading source of the grapes used in making the wine, it is inherently misleading and its use may be prohibited.

The California Supreme Court denied review. App. 172a.

REASONS FOR GRANTING THE WRIT

1. Under the Supremacy Clause, no state may *prohibit* what federal law affirmatively *authorizes*, whether that authorization takes the form of a statute, a regulation, or a license or permit. The California Supreme Court’s decision upholding Section 25241, which outlaws the use of wine labels expressly authorized by a federal regulation and numerous federally-issued COLAs, starkly conflicts with this settled principle. See pp. 11-14, *infra*. Moreover, the California Supreme Court’s distinction between “(1) not making an activity unlawful, and (2) making that activity

⁷While that remand was pending, Bronco filed a petition for certiorari with this Court, seeking review of the California Supreme Court’s preemption holding. Respondents opposed the petition on the grounds, *inter alia*, that the decision was not final in light of the remand. The Court denied the petition. See 125 S. Ct. 1646 (Mar. 21, 2005).

lawful,” App. 64a, is both wrong as applied to this case and deeply troubling. Virtually *every* federal authorization could be recharacterized this way, rendering none preemptive. See pp. 14-16, *infra*.

2. The California Supreme Court’s reliance on a presumption against preemption conflicts with decisions of this Court and the courts of appeals in two important respects. First, in requiring petitioners to prove that Congress or TTB had a “clear or manifest purpose” to preempt state law, the California Supreme Court ignored this Court’s repeated admonition that no such burden of proof exists in conflict preemption cases because “one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict” between federal and state law. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000); see cases cited on pp. 16-20, *infra*. Second, the presumption against preemption is inapplicable where, as here, “the State regulates in an area where there has been a history of significant federal presence.” *Locke*, 529 U.S. at 108-09; see pp. 21-22, *infra*. The California court’s cramped view that the “*Locke* exception” arises only when relevant federal regulation has been “manifest since the beginning of our Republic” squarely conflicts with numerous federal appellate decisions involving federal statutes and regulation no older than the FAAA. See *id*.

3. The California Court of Appeal created further conflicts with decisions of this Court and the federal and state appellate courts by holding that Bronco’s brands are “inherently misleading” and thus without First Amendment protection because the brands, standing alone, are “more likely to deceive the public than inform it.” Because the court did not ask whether any potential for deception could be cured by additional information on the labels, its decision conflicts with the decisions of the Court that have recognized disclosure as the preferred alternative for potentially misleading commercial speech. Review would give this Court an opportunity to clarify the line between “potentially

misleading” and “inherently misleading” commercial speech, a line that the lower courts have drawn inconsistently and in conflict with this Court’s decisions. See pp. 23-27, *infra*. Moreover, in deeming petitioners’ brands “inherently misleading,” the court below improperly deferred to the Legislature’s purported “findings” that petitioners’ brands were deceptive. But this Court’s cases teach that the question of whether speech is outside the First Amendment is subject to *de novo* review. The state court also improperly disregarded the findings of federal regulators that Bronco’s brands are *not* inherently misleading. Review is needed to make clear that courts exercise independent judgment in determining whether speech is inherently misleading, particularly when doing so conflicts with repeated expert judgments made by federal regulators. See pp. 27-30, *infra*.

A. THE CALIFORNIA SUPREME COURT’S CONCLUSION THAT SECTION 25241 IS NOT PREEMPTED CONFLICTS WITH DECISIONS OF THIS COURT.

1. Section 25241 Impermissibly Prohibits Conduct Expressly Authorized By 27 C.F.R. §4.39(i) And Federal COLAs.

“[S]tate law is naturally preempted to the extent of any conflict with a federal statute.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal regulations have “no less pre-emptive effect than federal statutes.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). A preemptive conflict between state law and a federal statute or regulation arises, *inter alia*, when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law—“whether that ‘obstacle’ goes by the name of ‘conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,’ or the like.” *Geier*, 529 U.S. at 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Under the rubric of obstacle- or conflict-preemption, this Court repeatedly has invalidated state laws that ban conduct specifically authorized by federal laws or regulations. See, e.g., *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (state law prohibiting national bank from selling insurance preempted by federal law allowing such sales); *de la Cuesta*, 458 U.S. at 154-59 (federal regulation permitting federally chartered savings and loans to exercise due-on-sale mortgage clause preempted state prohibition); *McDermott v. Wisconsin*, 228 U.S. 115, 125-26 (1913) (Treasury Department decision that syrup made of corn starch and sugar syrup could be labeled "Corn Syrup with Cane Flavor" preempted state law prohibiting such label).

Likewise, this Court, since *Gibbons v. Ogden*, has struck down state laws impairing the exercise of a license or permit issued under a federal regulatory scheme. See 22 U.S. (9 Wheat.) 1, 221 (1824) ("[T]he act of a State inhibiting the use of . . . any vessel having a license under the act of Congress, comes, we think, in direct collision with that [federal] act.") (Marshall, C.J.); accord, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (federal certification of vessel's safety preempted state's more stringent safety requirements); *Sperry v. Florida*, 373 U.S. 379, 384 (1963) (non-lawyer's admission to practice before U.S. Patent & Trademark Office preempted state law barring non-lawyers from such practice); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (*per curiam*) (federal certification of contractor as "responsible" preempted inconsistent state licensing requirements); *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946) (federal approval of interstate utility project preempted state attempt to forbid project).

All these cases reflect this Court's view "that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33; accord, e.g., *Leslie Miller, Inc.*, 352 U.S. at 190 ("Subjecting a federal

contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility.'"); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) ("[I]t would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate.").

The fact that a federal law, regulation, or other authorization is framed in *permissive*, rather than mandatory, terms thus is not determinative. As this Court has explained:

The two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said, “you must sell insurance,” while the state law said, “you may not.” Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State’s prohibition of those activities would seem to “stand as an obstacle to the accomplishment” of one of the Federal Statute’s purposes”

Barnett Bank, 517 U.S. at 31 (quoting *Hines*, 312 U.S. at 67); *cf. de la Cuesta*, 458 U.S. at 155 (a “conflict does not evaporate” simply because the state law at issue “permits, but does not compel” an action contrary to federal law).

Petitioners’ use of the brands and labels in question was both generally authorized by federal regulations and specifically authorized by individually-issued COLAs. The authorization granted by 27 C.F.R. §4.39(i)’s grandfather clause is functionally indistinguishable from the laws and regulations deemed preemptive in *Barnett Bank*, *de la Cuesta*, and *McDermott*. Likewise, the COLAs authorizing use of Bronco’s labels in interstate commerce are indistinguishable from the interstate licenses and permits held preemptive in *Gibbons*, *Ray*, *Sperry*, and *Leslie Miller*. By purporting to nullify the regulation and the COLAs, Section 25241 “amount[s] to a suspension or revocation” of a federally-granted “right to operate.” *Castle*, 348 U.S. at 64.

The California Supreme Court's decision upholding the statute thus conflicts with settled preemption principles.

2. The California Supreme Court's Attempt To Recast TTB's Authorization Of Petitioners' Brands And Labels As A "Non-Prohibition" Creates An Exception To Preemption That Could Swallow The Rule.

The California Supreme Court attempted to justify its decision with this Court's precedents by distinguishing "between (1) not making an activity unlawful, and (2) making that activity lawful" and by characterizing Section 25241 as merely "prohibiting—with respect to Napa County—what the federal regulation's grandfather clause *does not prohibit*." App. 64a (emphasis in original).

Whatever force the California Supreme Court's distinction between an express authorization and a failure to prohibit may have in other contexts, that distinction has no relevance here. TTB's geographic-brand rule does *not* simply leave certain labeling unaddressed. Rather, the regulation covers *all* geographic brand names, old and new, and specifies in affirmative language the conditions under which *each* category may be used. Thus, Bronco's brands and labels are lawful, not because they escape notice under 27 C.F.R. §4.39(i), but because that regulation *expressly* authorizes their use in commerce, as long as the label also bears a suitable appellation or some other statement "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." *Id.* §4.39(i)(2). Indeed, in providing alternative means of complying with a federal standard, the grandfather clause is quite analogous to the decision of the Secretary of Transportation not to require airbags in all cars, but to permit use of alternative safety devices, which this Court held preempted state tort liability for using such an alternative. See *Geier*, 529 U.S. at 881; see also, e.g., *Crosby*, 530 U.S. at 378 ("The State has set a different course, and its statute

conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.”).

Moreover, TTB did not simply authorize the use of grandfathered geographic brands as a class, through a regulation of general application. TTB also issued dozens of COLAs authorizing petitioners to use *each individual label* bearing a brand outlawed by Section 25241 and a non-Napa appellation of origin. The California Supreme Court made no serious attempt to square its decision with this Court’s many decisions holding such authorizations preemptive, but instead asserted without analysis that a COLA does not “constitute[] a license or permit as understood in those cases.” App. 69a. This unsupported *ipse dixit* cannot save a statute that so plainly conflicts with federal law.

Contrary to the California Supreme Court’s suggestion, the fact that the California Legislature’s goals were the same as Congress’s—preventing deception—does not save Section 25241. See App. 64a. As this Court has repeatedly stressed, the “fact of a common end” cannot neutralize a state statute’s “conflicting means.” *Crosby*, 530 U.S. at 379-80; accord, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 106-08 (1992) (collecting cases); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (“[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.”). In particular, this Court has deemed preemptive federal regulatory determinations of *how much regulation is required* to achieve a congressionally-mandated objective. See, e.g., *Ray*, 435 U.S. at 178 (preemption arises “where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (same). The same logic applies here, inasmuch as TTB actually rejected as “too restrictive” a rule that would have limited use of established

geographic brand names to wines from the region referenced in the brand. *See, e.g., Geier*, 529 U.S. at 881; *supra* at p. 4.

The California Supreme Court's decision not only is wrong, but also is a dangerous precedent. Arguably, *any* federal grant of authority, whether a law or regulation of general applicability or a license or permit specific to the holder, may be recast as merely "not making an activity unlawful." Such easy formalisms would render nugatory a critical portion of this Court's preemption jurisprudence.

B. THE CALIFORNIA SUPREME COURT'S APPLICATION OF A "PRESUMPTION AGAINST PREEMPTION" CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL APPELLATE COURTS.

1. In Conflict-Preemption Cases, There Is No Burden Of Proving "Clear And Manifest" Preemptive Intent On The Part Of Congress Or The Agency.

In holding that a presumption against preemption should apply absent proof of a "clear and manifest purpose" on the part of Congress or the agency to preempt state law, (App. 59a), the California Supreme Court contradicted this Court's repeated admonition that no such proof is necessary or appropriate in conflict-preemption cases:

While "[p]re-emption fundamentally is a question of congressional intent," this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area—so-called "field pre-emption"—the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. Indeed, one can assume that Congress or

an agency ordinarily would not intend to permit a significant conflict. (citations omitted).⁸

Geier, 529 U.S. at 884; accord, e.g., *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“[W]here state law is claimed to be pre-empted by federal regulation, a ‘narrow focus on Congress’ intent to supersede state law [is] misdirected,’ for ‘[a] pre-emptive regulation’s force does not depend on express congressional authorization to displace state law.’” (quoting *de la Cuesta*, 458 U.S. at 154 (brackets in quotations in original))).

At least one federal court of appeals, in a case involving analogous facts, has rejected the precise analysis used by the California Supreme Court. In *Wells Fargo Bank v. James*, 321 F.3d 488 (5th Cir. 2003), the Fifth Circuit addressed the preemptive effect of a federal regulation (12 C.F.R. §7.4002(a)) authorizing (but, as here, not requiring) national banks to “charge [their] customers non-interest charges and fees.” *Id.* at 490. Federal regulators had construed “customers” to include non-account-holders who presented checks to a national bank for payment. *Id.* A Texas statute, however, prohibited banks from levying charges for cashing a check drawn on the same bank, thus creating a conflict. *Id.* In striking down the state law, the Fifth Circuit rejected the notion that the plaintiffs had to show preemptive intent: “[W]e are concerned with whether Congress intended to delegate . . . the authority to authorize the non-account-holding payee check-cashing fee, not with whether Congress intended that state law would be

⁸This Court’s willingness to assume a *general* federal intent to preempt conflicting state law, rather than require proof of a preemptive intent specific to the particular statute or regulation, explains the numerous decisions of this Court invalidating state laws on implied conflict-preemption grounds without mentioning any presumption against preemption. E.g., *Barnett Bank*, 517 U.S. at 31; *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260-68 (1985); *Sperry*, 373 U.S. at 379.

preempted." *Id.* at 492-93 (citing *City of New York*, 486 U.S. at 64); *accord de la Cuesta*, 458 U.S. at 154 (proper question is whether agency "has exceeded [its] statutory authority or acted arbitrarily").

The California high court's decision to impose a presumption against preemption merely because Bronco could not show that Congress or TTBA had a "clear or manifest purpose" to preempt Section 25241 stands in clear conflict with this Court's decisions and with *Wells Fargo*.⁹ This Court should review the decision below to make clear that no such proof is necessary in conflict-preemption cases.

But this case also presents an opportunity to address a more fundamental question that was posed but not resolved by this Court in *Crosby* and on which the courts are in conflict, namely, whether the presumption against preemption should be *inapplicable* in conflict-preemption cases. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000). The California Supreme Court resolved this question in the negative, stating: "We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point." App. 13a n.12. The Seventh and Fourth Circuits more broadly "presume that, in *all* circumstances, 'Congress does not intend to supplant state law.'" *Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) (emphasis added); *accord Pinney v. Nokia, Inc.*, 402

⁹The California Supreme Court dismissed *Geier* in a footnote as immaterial on the puzzling ground that it "did not even address the presumption-against-preemption doctrine." App. 13a n.12. But that "doctrine" was the subject of explicit debate between the *Geier* majority and dissent, with the majority rejecting the "clear and manifest purpose" burden imposed by the California Supreme Court in this case. Similarly, that court did not mention the Fifth Circuit's decision in *Wells Fargo*, although it was directly on point and discussed in petitioners' briefs.

F.3d 430, 453 (4th Cir. 2005), *cert. denied* --- S. Ct. ---, 74 USLW 3108, 3269, 3274 (Oct. 31, 2005) (No. 05-198).

The Eleventh Circuit, however, has held that “we do not apply a presumption against preemption” at least in conflict preemption cases.¹⁰ *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1502 (11th Cir. 1997) (emphasis added) (citing *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989)); see also *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-27 (11th Cir. 2004) (applying presumption in field preemption, but not in conflict preemption, analysis); *Pharmaceutical Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) (reaffirming general unavailability of presumption in conflict preemption cases).

Likewise, as many commentators have pointed out, the Supremacy Clause betrays no suggestion of a presumption against preemption:

First, and most obviously, the constitutional text provides no basis for it. Although the Court has applied presumptions or clear-statement rules in the context of the 10th and 11th Amendments, those rules are supported by constitutional text that clearly preserves state authority. There is no comparable provision to justify a presumption against pre-emption.

To the contrary, the supremacy clause displaces state authority. It makes no more sense to root a presumption against pre-emption there than it would to base a presumption in favor of abrogating state immunity in the 11th Amendment. Indeed, if the supremacy clause supports any presumption, it supports one *in favor of pre-empting state authority*.¹¹

¹⁰ Although the specific holding in *Lewis* was effectively overruled by *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), *Sprietsma* did not address the applicability *vel non* of a presumption against preemption in conflict cases, thus leaving this aspect of *Lewis* undisturbed.

¹¹ Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In*,
(continued . . .)

As these commentators argue, the Supremacy Clause is not "about federalism" at all:

It neither limits federal power nor preserves state authority. To the contrary, it provides a choice-of-law rule in favor of federal law. No one disputes this. The pre-emption cases feature no long discourses on the historical meaning of the supremacy clause or heated disputes over its scope or justiciability. All nine justices agree that when federal and state law conflict, the former displaces the latter. Accordingly, the question that divides the Court in pre-emption cases is essentially one of statutory interpretation: Does the federal statute or regulation at issue really conflict with state law?

Clement & Dinh, *supra* note 11, at 66; accord LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6-28, at 1172 (3d ed. 2000) (conflict-preemption cases "may pose complex questions of statutory construction but raise no controversial issues of power" as between federal government and states).

As this Court acknowledged in *Geier*, preemption principles are sufficiently "difficult to apply" without the "further complicat[ion]" of new presumptions and special burdens that would create "practical difficulties for litigants and lower courts." *Geier*, 529 U.S. at 873. The Court thus should take the opportunity presented by this case to resolve a conflict in the lower courts over whether the presumption against preemption ever applies in conflict preemption cases

(... continued)

LEGAL TIMES, June 19, 2000, at 66; accord Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1319 (2004); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968, 971, 1013 (2002); Caleb Nelson, *Preemption*, 86 U. VA. L. REV. 225, 235-64, 292-93 (2000); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2094 (2000); The Supreme Court 1999 Term: Leading Cases, *Federal Preemption of State Law*, 114 HARV. L. REV. 339, 345-46 (2000).

and whether, if it does, evidence of preemptive intent on the part of Congress or a federal agency is necessary to avoid or overcome the presumption.¹²

2. The California Supreme Court's Reliance On The History Of Federal Wine-Labeling Regulation To Preclude Application Of The Presumption Against Preemption Conflicts With Decisions Of This Court And The Federal Courts Of Appeals.

Even in contexts in which a presumption against preemption may be applicable, this Court has refused to recognize such a presumption where, as here, "the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108-09. This Court, however, has not yet spelled out how much of a "history" of a "federal presence" is required, and how "significant" that presence must be, to trigger the *Locke* exception. Nor have lower court decisions provided clear answers to these questions. Compare, e.g., *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) (federal regulation of local telephone service commencing in 1996 sufficient to trigger *Locke* exception), and *Wachovia Bank v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (presumption "disappears" in face of longstanding federal regulation of federally chartered banks, despite "dual" system of state and federal regulation), with, e.g., *Pinney, Inc.*, 402 F.3d at 454 n.4 (federal regulation of wireless telecommunications does not trigger

¹²This Court recently invited the Solicitor General to submit a brief expressing the views of the United States in response to a petition for certiorari in a case concerning the applicability of the presumption against preemption in express-preemption cases. See Order dated Nov. 14, 2005, *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, No. 05-331, 546 U.S. --- (filed Sept. 12, 2005). Because the instant case concerns the applicability of the presumption against preemption in conflict-preemption cases, the Court may wish to call for the views of the Solicitor General here as well.

Locke exception where states retain “considerable authority” in that arena), and *Vaccaro v. Office of Personnel Mgmt.*, 262 F.3d 1280, 1292 (Fed. Cir. 2001) (Dyk, J., dissenting) (presumption should have applied because case involved domestic-relations issues, a traditional province of state law).

Even still, the California Supreme Court appears alone in interpreting *Locke* to require proof of a substantial federal presence dating back to the “beginning of our Republic” to avoid application of the presumption against preemption. App. 37a n.42. To be sure, *Locke* itself involved a federal regulatory field of such early vintage. But *Locke* nowhere states or even implies that *only* such hoary federal involvement will foreclose the presumption, and the federal appellate courts applying *Locke* clearly have read no such arbitrary limitation into it. Indeed, many cases invoking the — *Locke* exception have involved federal regulatory schemes that arose contemporaneously with, or even later than, the FAAA. E.g., *Public Util. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 648 n.7 (9th Cir. 2004) (Federal Power Act of 1935); *Wisconsin Bell*, 340 F.3d at 441 (federal regulation of local telephone service commencing in 1996); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (Federal Communications Act of 1934); *UPS v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (Federal Aviation Administration Authorization Act of 1994).

In this case, it is undisputed—even by the California Supreme Court—that as of 2000, when California adopted Section 25241, an extensive federal system of “national rules governing the distribution, production, and importation of alcohol” had been in place for over 75 years. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995). This case thus presents an opportunity to clarify when the “federal presence” is sufficiently long-standing to trigger the *Locke*

exception, and in particular, to make clear that it need not date back to the “beginning of our Republic.”¹³

C. THE LOWER COURT’S HOLDING THAT BRONCO’S BRANDS ARE “INHERENTLY MISLEADING” AND THUS UNPROTECTED UNDER THE FIRST AMENDMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

1. This Court Should Grant Review To Clarify When Speech Is “Inherently” As Opposed To “Potentially” Misleading

In addressing the constitutionality of government attempts to regulate allegedly misleading speech, this Court has stressed the “constitutional presumption favoring disclosure over concealment.” *Ibanez v. Florida Dep’t of Bus. & Prof. Regulation*, 512 U.S. 136, 145 (1994); *see also Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 476 (1988) (speech may not be banned if “State can regulate such abuses and minimize mistakes through far less restrictive and more precise means”); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (State may not ban allegedly misleading speech “if the information also may be presented in a way that is not deceptive”). In sum, “[i]f the First Amendment means anything, it means that regulating speech must be a last—not

¹³Petitioners do not concede the accuracy of the California Supreme Court’s historical account of federal wine labeling regulation before the FAAA—especially the court’s conclusion that such regulation was a “failure” (App. 35a-36a), and was not even “enforceable” (*id.* at 24a-26a; *see id.* at 22a-28a). For example, authority relied upon by the California Supreme Court establishes that the federal government, from the earliest days of the Republic, *did* regulate the packaging and “marking” of liquor, including wine. Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 540, 552 & n.58 (1940); *see* App. 15a. But even if pre-FAAA federal regulation was less robust than concurrent state regulation (and petitioners dispute this), nothing in *Locke* or its progeny teaches that the presumption applies unless federal regulation of the field in question equaled or exceeded state regulation in quantity or quality.

a first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)

In line with the “constitutional presumption favoring disclosure over concealment,” this Court has long distinguished between “inherently misleading” speech and “potentially misleading” speech. See, e.g., *R.M.J.*, 455 U.S. at 203; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 638 (1985); *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 110 (1990); *Ibanez*, 512 U.S. at 145. If “advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive,” the speech is unprotected and may be banned outright. *R.M.J.*, 455 U.S. at 202. If, however, “the information also may be presented in a way that is not deceptive,” the speech is only “potentially misleading,” and the permissible cure is more “disclosure, not concealment.” *Ibanez*, 512 U.S. at 145.

The court below acknowledged the distinction between inherently and potentially misleading speech, but then effectively obliterated that distinction by holding that a brand name is “inherently misleading and its use may be prohibited” if it “is more likely to deceive the public than to inform it.” App. 83a. The court based this test for identifying inherently misleading speech—and its focus on the brand names standing alone—on this Court’s statement in *Central Hudson*: “[t]he government may ban forms of communication *more likely to deceive* the public than to inform it.” App. 81a (quoting *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557, 563 (1980)).

Central Hudson, however, was decided several years before this Court first articulated the distinction between inherently misleading and potentially misleading commercial speech. Those later decisions establish that a court must consider, not whether the speech at issue, standing alone, is “more likely to deceive the public than to inform it,” but rather whether “the information may also be presented in a

way that is not deceptive.” *Ibanez*, 512 U.S. at 145. Thus, Bronco’s First Amendment challenge to Section 25241 does not turn on whether its *brands* are “more likely to deceive” than not, but whether potential misimpressions created by the brands are, or could be, cured by other information on the *labels*.¹⁴ In short, the Court of Appeal got the wrong answer because it asked the wrong question.¹⁵

The court below is not alone in relying on an improper “more likely to deceive the public than to inform it” standard for inherently misleading speech. Other state courts have invoked the same standard. See *In re Keller*, 792 N.E.2d 865, 869 (Ind. 2003); *Desnick v. Dep’t of Prof. Regulation*, 665 N.E.2d 1346, 1354 (Ill. 1996); *Barry v. Arrow Pontiac, Inc.*, 494 A.2d 804, 813 (N.J. 1985); cf. *Adams Ford Belton, Inc. v. Mo. Motor Vehicle Comm’n*, 946 S.W.2d 199, 203 (Mo. 1997) (finding term “likely to deceive” and therefore “inherently misleading”). The Fourth Circuit in *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), adopted a similarly broad test, finding use of the term “public accountant” by a non-CPA to be “inherently misleading” because it believed that “some members of the public would believe the title . . . has the state’s imprimatur.”

¹⁴Bronco does not concede that its brands are inherently misleading even if considered in isolation. After long use of such brands, “the geographic term takes on a new meaning denoting the trademark owner as source.” 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §14.9 (2004); accord *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 766 n.4, 768 (1992). The record below amply demonstrates that Bronco’s brands have come to identify the owner as the source of the wines. See, e.g., PA 187, 241, 247, 274-75, 354-55, 410-11.

¹⁵The lower court also erred in relying on *Friedman v. Rogers*, 440 U.S. 1 (1979); see App. 82a. *Friedman* was decided when commercial speech jurisprudence was “as yet uncharted.” *Id.* at 10 n.9. Indeed, it predated both *Central Hudson* and the Court’s later decisions distinguishing between inherently and potentially misleading speech. Thus, the *Friedman* Court’s suggestion that no “First Amendment rule” requires the use of disclaimers “whenever the publication of additional information can clarify or offset the effects of the spurious communication,” 440 U.S. at 12 & n.11, conflicts with these later cases.

Id. at 605 (emphasis added). Indeed, the Fourth Circuit specifically rejected the plaintiff's argument that the words could not be banned "if the less restrictive alternative of additional explanatory language is available." *Id.*

In contrast, the Tenth Circuit and New York, following this Court's guidance, have limited the "inherently misleading" category to speech that is "incapable of being presented in a [non-misleading] way." *Revo v. Disciplinary Bd.*, 106 F.3d 929, 933 (10th Cir.) (citing *R.M.J.*, 455 U.S. at 203) (emphasis added), *cert. denied*, 521 U.S. 1121 (1997); *accord Pearson v. Shalala*, 164 F.3d 650, 655-59 (D.C. Cir. 1999) (rejecting as "almost frivolous" argument that claims on health supplements are inherently misleading absent "significant scientific agreement" where concern could be accommodated by adding disclaimers); *In re von Wiegen*, 63 N.Y.2d 163, 173 (1983) ("If a certain type of information can be presented in a way that is not deceptive, a State may not absolutely prohibit the method used because it is sometimes used to disseminate misleading information.").

The Ninth Circuit employs a "four-factor test" for inherently misleading speech. See *Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994) (internal citations omitted). That test inquires as to "(i) whether the speech restricted is devoid of 'intrinsic meaning,' . . . ; (ii) the 'possibilities for deception,' . . . ; (iii) whether 'experience has proved that in fact such advertising is subject to abuse,' . . . ; [and] (iv) the 'ability of the intended audience to evaluate the claims made.'" *Id.* at 731 (citations omitted).

The test used by the Tenth Circuit and New York is the only standard consistent with the "constitutional presumption favoring disclosure over concealment," *Ibanez*, 512 U.S. at 145, and the notion that "regulating speech must be a last—not a first—resort," *W. States Med. Ctr.*, 535 U.S. at 373; *accord, e.g., Peel*, 496 U.S. at 111 (noting the "constitutional presumption favoring disclosure over concealment"); *R.M.J.*, 455 U.S. at 203. Applying this test would have resulted in a different result below, for there was no evidence before the

Legislature or the courts establishing that Bronco's brands are *incapable* of being presented in a non-misleading way.¹⁶ Even if the requirements imposed by 27 C.F.R. §4.39(i)(2) were deemed insufficient, other potential disclosures could be mandated that presumably would cure any potential deception, including, for example, a disclosure stating "GRAPES NOT GROWN IN NAPA COUNTY." *Cf. W. States Med. Ctr.*, 535 U.S. at 373 (striking down provisions of Food and Drug Administration Modernization Act prohibiting advertising and promotion of particular compounded drugs where legislative history showed that government considered available less-restrictive alternatives).

This conflict over the definition of "inherently misleading" commercial speech is no small matter. Such speech has no protection under the First Amendment, and thus may be completely suppressed, without any showing that *Central Hudson* standards have been met. Hence, the conflict cries out for this Court's attention.

2. The Court Should Grant Review To Reverse The State Court's Failure To Give Any Weight To The Repeated Federal Agency Determinations That Petitioners' Labels Are Not Misleading.

In determining that the labels proscribed by Section 25241 are "inherently misleading," the Court of Appeal not only relied on an improper standard, but also wrongly deferred heavily to the California Legislature's "finding" that

¹⁶The evidence before the Legislature consisted of a telephone survey using undisclosed methodology to test consumers' responses to fictional brand names read to them in isolation (no actual labels were provided), along with letters solicited by the NVVA from winery owners and others in the trade alleging that Bronco's brands were deceptive, but not identifying any instance of actual deception or consumer confusion. App. 86a-88a & nn.10-17. In contrast, petitioners' experts testified that, in their collective 100 years of experience in the retail wine industry, they had never encountered a single instance of consumer confusion involving Bronco's brands. PA 345, 373, 377, 381.

the use of any "Napa brand" with any non-Napa appellation is inherently misleading, reviewing that finding only to see if the Legislature's conclusions were reasonable in light of the evidence presented to that body. App. 84a-86a. This approach directly conflicts with this Court's holdings that courts may not defer to the judgment of state legislative bodies in determining whether commercial speech is "inherently misleading." *Peel*, 496 U.S. at 108 ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which members of this Court should exercise *de novo* review."); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996).

Moreover, while deferring uncritically to the findings made by the California Legislature, the court below effectively disregarded the contrary findings made by TTB, in 27 C.F.R. §4.39(i) and the numerous COLAs issued to petitioners, that neither grandfathered brand names in general nor petitioners' labels in particular are inherently misleading. In the Court of Appeal's view, the grandfather clause was a "compromise" that was "based upon policy considerations rather than findings of fact," and the COLAs issued to petitioners likewise did not "constitute a finding of fact that overrides a contrary finding by the California Legislature." App. 90a, 92a-93a.

This rationale is manifestly spurious. Although TTB did not make explicit "findings of fact" in the manner of a trial court, its statements in the *Federal Register* notice adopting 27 C.F.R. §4.39(i) include the specific finding that the rule—including the grandfather clause—would "provid[e] consumers with protection from any misleading impressions that might arise from the use of geographic brand names." 51 FED. REG. at 20,482. That finding is further embodied in the rule itself, which provides that grandfathered brands may be used as long as the label also bears a suitable appellation or "some other statement which the appropriate ATF officer finds to be sufficient to dispel

the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.” 27 C.F.R. §4.39(i)(2). Unless TTB found that grandfathered brands are only *potentially* misleading, it could not have concluded that an appellation of origin or “some other statement” could be “sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.”

Likewise, as TTB has stressed, its role in reviewing labels is “on a case-by-case basis to *determine* whether any particular label is likely to mislead consumers, including as to the origin of the product” or otherwise fails to conform to federal regulations. 66 FED. REG. at 29,478 (emphasis added). That review process inherently is fact-based, and a COLA necessarily represents a finding that a particular brand name, as viewed in the context of an entire label, is *not* inherently misleading. Any other conclusion entails the assumption that TTB routinely disregards its statutory duty to act so as to “prohibit deception of the consumer,” 27 U.S.C. §205(e), an assumption at odds with the traditional deference accorded an agency’s implementation of the statutory scheme it is charged to administer. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (citing cases).

Judicial deference is owed to a regulation, like 27 C.F.R. §4.39(i), that is adopted by an expert agency after formal notice-and-comment rule-making. *See Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85, 392 (1965) (“[A]s an administrative agency which deals continually with cases in the area, the [FTC] is often in a better position than are courts to determine when a practice is ‘deceptive’ within the meaning of the Act.”). Judicial deference also is required when a federal agency interprets a statute through case-by-case decisionmaking, as TTB does in reviewing labels for approval. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). While TTB’s determinations that petitioners’ labels

are not misleading, as expressed in 27 C.F.R. §4.39(i) and the COLAs issued to petitioners, perhaps do not automatically “override” the Legislature’s contrary determination, they surely are entitled to “substantial deference” by a court deciding *de novo* whether the latter determination is correct. The Court of Appeal’s failure to accord these federal determinations *any* weight conflicts with settled law, and therefore warrants review by this Court.

CONCLUSION

The petition should be granted.

DATED: November 22, 2005.

Respectfully submitted,

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05-653 NOV 22 2005

No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER CIRCLE,
INC.,

Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of
Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY
VINTNERS ASSOCIATION,

Respondents.

*On Petition For A Writ Of
Certiorari To The Supreme Court Of California*

PETITIONERS' APPENDIX

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APPENDIX A

33 Cal. 4th 943

**SUPREME COURT OF
CALIFORNIA**

**BRONCO WINE COMPANY et al.,
Petitioners, v. JERRY R. JOLLY, as
Director, etc., et al., Respondents;
NAPA VALLEY VINTNERS
ASSOCIATION, Intervener.**

S113136

August 5, 2004, Filed

NOTICE: As modified Oct. 13, 2004

OPINION:

GEORGE, C. J.--This case concerns three brand-name labels (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) appearing on wine bottled and marketed by petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (hereafter Bronco). These wines are made not from grapes grown in Napa County, or in the Rutherford viticultural (wine grape growing) region of Napa County,¹ but instead from grapes grown in areas far from Napa, such as Stanislaus County and the environs of the City of Lodi--areas where the cost of grapes, and often their perceived quality as well, is considerably lower. The challenged bottle labels have been approved by the federal agency charged by Congress with enforcing federal labeling law but violate a four-year-old

¹ Rutherford is a federally recognized viticultural region located within Napa County. (27 C.F.R. § 9.133 (2003); all further citations to the Code of Federal Regulations are to the 2003 edition unless otherwise indicated.)

California wine labeling statute, which requires that, when the word "Napa" (or any federally recognized viticultural region within Napa County) appears on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. (Bus. & Prof. Code, § 25241 (hereafter section 25241).) We granted review to consider the Court of Appeal's conclusion that federal law preempts the state law. We conclude that the state labeling statute is not preempted by federal law and hence that the judgment rendered by the Court of Appeal must be reversed.

I.

Bronco asserts that it specializes in "premium wines at affordable prices." Some of Bronco's wine is bottled at its facilities in Ceres (near Modesto, in Stanislaus County) and in Sonoma County; other Bronco wines are bottled by petitioner Barrel Ten Quarter Circle, Inc., at a recently completed facility in the City of Napa, in Napa County. The latter plant is capable of producing approximately 18 million 12-bottle cases per year--output that would be more than double the current annual production of Napa-grown wines.

Bronco sells wines under approximately 30 labels or brand names. A representative label for the three challenged brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) is set forth in the appendix.² As can be seen, with regard to the representative Napa Ridge label, the label lists (in smaller lettering and below the brand name) the "designation" of the wine (the varietal name White Merlot), followed underneath by the "appellation of origin"--the geographic source of the grapes (Lodi). The representative Napa Creek Winery label lists (in smaller lettering and below the brand name) the appellation of origin (Lodi), followed

² The labels set forth in Bronco's appendix to the petition for writ of mandate are divided into sections for each of the three brand names. The labels selected for description below and displayed in the appendix to our opinion are the first from each section.

underneath by the varietal name (Chardonnay). The representative Rutherford Vintners label lists (in smaller lettering and below the brand name) the appellation of origin (Stanislaus County), followed underneath by the varietal name (Merlot). The "back label" of each states that the wine was "vinted and bottled" by the named winery in "Napa, CA" or in "Napa, California."³ In addition, many of the Napa Ridge wines include the word "Napa" on bottleneck collars, and some include that word on branded corks.

Bronco acquired these three brand names, and the right to use these labels, from predecessor owners of wineries located in Napa County. The Napa Ridge brand, which Bronco acquired in January 2000 from Beringer Wine Estates for more than \$ 40 million, had been in use since the early 1980s. The Napa Creek Winery brand, introduced in 1981, was acquired by Bronco in 1993. The Rutherford Vintners brand originated in the early 1970s, and was acquired by Bronco in 1994.

The prior owner of the Napa Ridge brand had used that name and label for wines made from grapes grown in California's Central Coast, North Coast, and Lodi appellation areas, as well as from Napa County. All of the wines previously marketed by the prior owner under the Napa Creek Winery brand and most wines previously marketed by the prior owner under the Rutherford Vintners brand had been

³ The word "vinted" is used when wine is fermented at one address and thereafter subjected to "cellar treatment" (such as filtering) at a different address stated on the label. (See 27 C.F.R. § 4.35a(a)(3) & (v).) Each back label also contains a further statement concerning the appellation of origin. The Napa Ridge back label states: "This White Merlot, from the Lodi Region of Northern California, starts with an enticing aroma of strawberry and cherry. . . ." The Napa Creek Winery back label states: "From vineyards blessed by the warm days and cool nights of California's famed Lodi viticultural area, our Chardonnay is well structured with complex flavors from partial barrel fermentation. . . ." The Rutherford Vintners back label reads: "These grapes were harvested from the lush vineyards of Stanislaus County. . . ."

made from Napa County grapes. Under Bronco's ownership, all three of these brands have been used almost exclusively to sell wines made from grapes grown outside Napa County.

The bill that became section 25241 was introduced in the California Legislature in February 2000 (Assem. Bill No. 683 (1999-2000 Reg. Sess.)). After receiving substantial public comment and holding hearings,⁴ the Legislature found: "(a)(1) . . . [F]or more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County. (2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices. (3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin." (§ 25241, subd. (a), added by Stats. 2000, ch. 831, § 1.)⁵

⁴ The Legislature heard evidence of intent, or at least willingness, to expand dramatically the marketing of Napa-named brands, including the hope of fully utilizing the capacity of the new 18-million-case bottling plant in the City of Napa, to produce wine from grapes grown outside Napa County. (See transcript of Sen. Governmental Organization Com. hearings on Assem. Bill No. 683 (June 27, 2000), at pp. 29 & 31 [responses to questions by Sen. Chesbro].)

⁵ Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results

The resulting legislation, section 25241, provides in relevant part that no wine produced or marketed in California shall use a brand name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County. (*Id.*, subd. (b).)⁶

presented at the hearings disclosing consumer confusion relating to such labels. Moreover, as observed at the hearings, an uninformed consumer may not know that an unelaborated term (for example, Lodi) appearing on a label refers to a geographic location outside Napa County or even that the named location (in contrast to the brand name of the wine) signifies the place where the grapes used to make the wine actually were grown. Similarly, consumers in restaurants who order wine by the bottle or the glass from menus may be aware only of the brand name of the wine and generally will not have an opportunity to read the label of the bottle before placing an order.

⁶ Section 25241 sets out in subdivision (a) the findings quoted above, and then provides:

"(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a [now section 4.25--see 68 Federal Register 39454, 39455 (July 2, 2003)] of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.

"Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations.

"(c) The following are names of viticultural significance for purposes of this section:

"(1) Napa.

"(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of

The legislative history discloses that section 25241 was designed to close what some legislators termed a "loophole" created by an exception in a federal wine labeling regulation. As discussed more fully below, federal law (the Federal Alcohol Administration Act, or FAA Act, 27 U.S.C. § 201 *et seq.*), enacted by Congress in 1935, bars misleading statements on wine labels (*id.*, § 205(e)) and requires federal approval of each label (via a certificate of label approval [hereafter sometimes COLA]) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, also described more fully below, designed to implement 27

the Code of Federal Regulations that is located entirely within Napa County.

"(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

"(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

"(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

"(f) The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

"(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001."

United States Code section 205(e), generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine were in fact grown in that area (27 C.F.R. § 4.39(i)(1)). But a "grandfather clause" appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. (*Id.*, § 4.39(i)(2)(ii).)⁷ In other words, the state statute prohibits, with respect to

⁷ 27 Code of Federal Regulations section 4.39(i) provides:

"(i) *Geographic brand names.* (1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

"(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:

"(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

"(ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either:

"(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;

"(B) A state, county or a viticultural area, if the brand name bears a state name; or

"(iii) The wine shall be labeled with some other statement which the appropriate ATF [Bureau of Alcohol, Tobacco and Firearms] officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

"(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer."

Napa County, what the federal regulation's grandfather clause does not prohibit.⁸

In late December 2000, shortly before section 25241 was to become effective, Bronco filed an original petition for a writ of mandamus in the Court of Appeal,⁹ seeking to prohibit respondents (the Department of Alcoholic Beverage Control and its then Interim Director, Manuel R. Espinoza, currently Jerry R. Jolly, Director) (hereafter the Department) from enforcing section 25241 with respect to Bronco's wines, on the ground that the state statute to the extent it applies to wine destined for interstate or foreign commerce is preempted by the grandfather clause contained in the federal law. Bronco also claimed that the California statute violates the First Amendment, the commerce clause, and the takings clause of

⁸ Bronco asserts that the statute was drafted in such a manner as to protect other established Napa County wineries, and to target "only a single brand owner--Bronco" (and its three grandfathered brands). The record discloses, however, at least 32 other Napa-related "grandfathered" brands (none of which, it appears, *presently* produces any wine that would violate section 25241) that also would be covered by the statute, including the "Napa named" brands Napa Wine Cellars, Napa Wine Co., Napa Cellars, Napa Valley Winery, Napa Vintners, and "Napa viticultural appellation" brands Rutherford Hill, Stag's Leap Wine Cellars, Stags' Leap Winery, Spring Mountain, Mount Veeder Winery, St. Helena Vineyards, and Oakville Vineyards.

Bronco also complains that the statute is underinclusive, in that it does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area within Napa, such as the brand "Stag's Leap Wine Cellars," for a Napa County wine made with grapes grown outside the Stags Leap District of the Napa Valley. (Cf. Bus. & Prof. Code, § 25240 [requiring such labels to state a "Napa Valley" appellation in addition to the viticultural area within Napa Valley].) Any such underinclusiveness, however, is irrelevant to our present preemption inquiry.

⁹ Business and Professions Code section 23090.5 divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing Business and Professions Code section 25241.

the United States Constitution. Intervener Napa Valley Vintners Association (the NVVA) joined with the Department in defending the validity of the state enactment. The Court of Appeal issued an alternative writ and granted a stay of enforcement of section 25241. As noted above, that court ultimately concluded that section 25241 is preempted by federal law, and to date that statute has not been enforced. We granted review to address the preemption issue only.

II.

A.

The basic rules of preemption are not in dispute: Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352, (*Crosby*).) In determining whether federal law preempts state law, a court's task is to discern congressional intent. (*English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65.) Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (*Jones*).) Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (*Rice*)); (ii) when compliance with both federal and state regulations is an impossibility (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (*Florida Avocado*)); or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (*Hines*); see also *Crosby*, *supra*, 530 U.S. at p. 373; *Barnett Bank of*

Marion Cty., N.A. v. Nelson (1996) 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (*Barnett Bank*); *Lawrence County v. Lead-Deadwood School Dist.* (1985) 469 U.S. 256, 260 105 S. Ct. 695, 83 L. Ed. 2d 635 (*Lawrence County*); *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699, 104 S. Ct. 2694, 81 L. Ed. 2d 580; see also *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923-924, 12 Cal. Rptr. 3d 262, 88 P.3d 1 (*Dowhal*).)

In the present case, it is clear that Congress has not expressly preempted state authority with respect to the regulation of wine generally, or with respect to wine labels in particular, and Bronco does not contend otherwise. Neither does Bronco contend that this is a case in which Congress has occupied the field and thus impliedly preempted the state statute here at issue. Nor does Bronco contend that implied preemption is shown because compliance with both federal and state regulations is impossible; as Bronco concedes, it can comply with the stricter state law and simultaneously comply with federal law. Instead, Bronco asserts that we should find implied preemption in this case because *section 25241* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹⁰ (Cf. *Dowhal, supra*, 32 Cal.4th 910, 929, 935 [state law warnings concerning nicotine frustrate the purposes of the federal *Food, Drug & Cosmetic Act* and corresponding federal regulations].)

As we shall explain, we disagree that *section 25241* is impliedly preempted by federal law. In reaching this conclusion we first address Bronco's assertion that a presumption against preemption does not apply in this matter. (See *post*, pt. II.B.1.) After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the *FAA Act in 1935*--a history that reveals substantial state involvement and very little federal

¹⁰ Bronco suggests, however, that the state properly may "enact an 'in-state' version of *section 25241*"--a regulation that would, presumably, apply only with respect to wine that is not sold in interstate commerce.

regulation--we conclude that a presumption against preemption does indeed apply in this case. Next, we address the intent of Congress in enacting the FAA Act in 1935. (See *post*, pt. II.C.1.) The legislative history of that enactment reveals congressional intent, among other things, (i) to prevent the deception or misleading of consumers related to the labeling of wine and other alcoholic beverages, and (ii) to supplement--but not supplant--existing state regulation of the industry. We next consider the intent of the responsible federal regulatory agency vis-a-vis state regulation of wine brand labeling, as reflected in regulations and comments set out in the Federal Register. (See *post*, pt. II.C.2.) As we explain, the record reveals that the federal regulatory agency has long operated on the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, we address the substantive issue of implied preemption of the particular state legislation at issue, and conclude that the California statute in question does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See *post*, pt. II.D.)

B.

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (See, e.g., *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 422 [106 Cal. Rptr. 2d 271, 21 P.3d 1189], and cases cited.) An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*California v. ARC America Corp.* (1989) 490 U.S. 93, 101 [104 L. Ed. 2d 86, 109 S. Ct. 1661], italics added (*ARC America Corp.*), quoting *Rice, supra*, 331 U.S. 218, 230; see also, e.g., *United States v. Locke* (2000) 529 U.S. 89,

107-108 [146 L. Ed. 2d 69, 120 S. Ct. 1135] (*Locke*); *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [135 L. Ed. 2d 700, 116 S. Ct. 2240] (*Medtronic*) [presumption applies both to the existence of preemption and the scope of preemption]; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 157 [55 L. Ed. 2d 179, 98 S. Ct. 988] (*Ray*); *Jones, supra*, 430 U.S. 519, 525; *Florida Avocado, supra*, 373 U.S. 132, 146; *Allen-Bradley Local v. Board* (1942) 315 U.S. 740, 749 [86 L. Ed. 1154, 62 S. Ct. 820]; *Napier v. Atlantic Coast Line R. Co.* (1926) 272 U.S. 605, 611 [71 L. Ed. 432, 47 S. Ct. 207]; *Savage v. Jones* (1912) 225 U.S. 501, 533 *et seq.* [56 L. Ed. 1182, 32 S. Ct. 715] (*Savage*); *Reid v. Colorado* (1902) 187 U.S. 137, 148 [47 L. Ed. 108, 23 S. Ct. 92].) As explained in *Jones, supra*, 430 U.S. 519, 525, this venerable presumption “provides assurance that ‘the federal-state balance,’ . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.” (Citation omitted; see *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815 [135 Cal. Rptr. 2d 1, 69 P.3d 927] (*Olszewski*).)

The Department and the NVVA assert that the state regulation at issue in this case directly implicates the traditional police powers of the states to protect consumers from deception in the marketing of food and beverages, and to safeguard the integrity--and worldwide market--of a vital California industry. (See, e.g., *Florida Avocado, supra*, 373 U.S. 132, 146 [state police powers properly are employed both to protect consumers’ health and to “prevent the deception of consumers”]; *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 143 [25 L. Ed. 2d 174, 90 S. Ct. 844] [recognizing a state’s interest in protecting its reputation as a reliable source of authentic, high-quality goods in all markets where its goods compete].) Indeed, we observed as much concerning the California wine industry, more than 100 years ago. (*Ex parte Kohler* (1887) 74 Cal. 38, 42-43 [15 P. 436] [state wine labeling statute, designed to protect the health of

consumers and the integrity of the wine industry, was a proper exercise of the police power].)

Bronco and amici curiae on its behalf, Abundance Vineyards et al.,¹¹ assert, however, that no presumption against preemption applies in this case because there is no evidence that states traditionally have exercised their police powers to regulate the labeling of wine.¹² Specifically, Bronco argues that prior to the August 1935 enactment of the

¹¹ Counsel for amici curiae represent, among other entities, more than 68 wineries in Alabama, Arizona, Arkansas, California, Georgia, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington, as well as 47 wine grape growers in California.

¹² Bronco, relying upon two Eleventh Circuit Court of Appeals decisions (*Lewis v. Brunswick Corp.* (11th Cir. 1997) 107 F.3d 1494, 1502, and *Taylor v. General Motors Corp.* (11th Cir. 1989) 875 F.2d 816, 826), and, to a lesser extent, two high court decisions (*Geier v. American Honda Motor Co.* (2002) 529 U.S. 861, 870-874 [146 L. Ed. 2d 914, 120 S. Ct. 1913] (*Geier*), and *Engine Manufacturers Association v. South Coast Air Quality Management District* (2004) ___ U.S. ___, ___ [158 L. Ed. 2d 529, 124 S. Ct. 1756, 1763] (*Engine Manufacturers*)), also asserts, as a preliminary matter, that the presumption against preemption is categorically inapplicable in implied preemption cases such as this, in which the question is whether state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The United States Supreme Court has not so held, however, and indeed has assumed otherwise. (*Crosby, supra*, 530 U.S. 363, 373-374 & fn. 8.) *Geier*, by contrast, did not even address the presumption-against-preemption doctrine, and in *Engine Manufacturers* the court simply found it unnecessary, because of its conclusion that the federal legislation expressly preempted the relevant state law, to address the presumption against preemption or even the legislative history of the federal statute. We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point. (See, e.g., *Philip Morris Inc. v. Harshbarger* (1st Cir. 1997) 122 F.3d 58, 85-86 [applying a "strong presumption against preemption" concerning state health and safety regulations and finding those regulations not to frustrate congressional purposes].)

FAA Act, 27 *United States Code section 201 et seq.*, federal regulation of wine labeling was "well-established," whereas the activity of the states in that enterprise was "limited." Bronco maintains that "although the states have played a limited role in regulating wine labeling over the past century, the federal government's presence in that field would negate the application of any presumption against preemption in this case." Amici curiae assert, similarly and more emphatically, that prior to enactment of the *FAA Act in August 1935* "state and local authorities had exercised control over the distribution and sale of liquor" but that "it was the federal government that first comprehensively regulated the packaging and labeling" of wine.

The Department and the NVVA, on the other hand, point to early California statutes addressing wine labeling, isolated statements in treatises and legal articles, and statements in congressional reports and debates suggesting an intent by Congress in 1935 that the *FAA Act*, including 27 *United States Code section 205(e)* and the regulations that would be expected to flow therefrom, would supplement state regulation of wine labeling but not preempt it.

Prior to oral argument we solicited supplemental briefing from the parties, asking them to address the effect, if any, of numerous additional state statutes and regulations disclosed in the course of our review of this case. Having considered those materials and the parties' supplemental briefs, we conclude below that the historic record amply supports the conclusion that a presumption against preemption applies in this case because the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states.¹³

¹³ At oral argument, as in the Department's briefs, the NVVA maintained that the "relevant area" for purposes of determining whether the presumption against preemption is applicable should be viewed as consumer protection related to the labeling of foods and beverages in

1. *Regulation of wine labels prior to adoption of the FAA Act in August 1935*

Prior to the 20th century, federal legislation relating to wine and alcohol focused essentially upon revenue collection--specifically, enforcement of federal tax laws. (See Byse, *Alcoholic Beverage Control Before Repeal* (1940) 7 Law & Contemp. Probs. 543, 552, fns. 57 & 58 (*Alcoholic Beverage Control Before Repeal*).) By contrast, as disclosed below, widespread legislation enacted by states in the mid to late 19th century, and continuing through adoption of the *FAA Act in August 1935*, focused upon the substantive public problems of "adulteration" and "misbranding" (or "mislabeling") of wines and alcohol. This historic record supports the view that prior to adoption of the federal act in 1935, states vigorously exercised their police powers to regulate wine labeling.

a. *The emergence of state "pure food" and labeling statutes*

During the latter half of the 19th century, awareness gradually increased throughout the nation concerning a combination of related problems in the supply of food and beverages. Some food and beverage products were mere imitations or dilutions of what they purported to be; other products, subject to spoilage, were "adulterated" by a "soaring employment of chemical preservatives." (Young, *Pure Food* (1989) p. 126.) Many of these preservatives--such as salicylic acid, employed as a preservative in wine (*id.*, at p.

general or, more specifically, as consumer protection related to the labeling of wines. Bronco, although generally challenging the appropriateness of applying any presumption against preemption in this case (see *ante*, fn. 12), does not contest the definition of the relevant area for such an inquiry as proposed by the Department and the NVVA. For purposes of this opinion, and consistently with the high court's approach in such matters (see, e.g., *ARC America Corp.*, *supra*, 490 U.S. 93, 101 [in addressing whether federal antitrust law preempts state law, defining the relevant area as "state common-law and statutory remedies against monopolies and unfair business practices"]), we view the relevant area as being consumer protection related to food and beverage labeling, with special emphasis upon wine labeling.

105)--were used in excessive quantities dangerous to health. (*Id.*, at pp. 110, 112, 126.) As a result, it was found that more than "73 per cent of the milk in Buffalo [New York] was watered, 69 of 171 samples of ground coffee collected in New York were adulterated, 71 percent of the olive oils examined in New York and Massachusetts were mixed with cotton seed oil which had been shipped from the United States and returned as 'olive oil'[, and] [f]orty-six percent of candy samples collected in Boston contained mineral pigments, chiefly lead chromate." (Hart, *A History of the Adulteration of Food Before 1906* (1952) 7 *Food Drug Cosm. L.J.* 5, 21); see also McCumber, *The Alarming Adulteration of Food and Drugs* (Jan. 5, 1905) *The Independent*, 28, 29-31 [listing common adulterations of various products].) Wines too were subject to abuses. Some were "made from cheap substances and then doctored up." (Regier, *The Struggle for Federal Food and Drugs Legislation* (1933) 1 *Law & Contemp. Probs.* 3, 8.) Others were mislabeled as to place of origin. (Carosso, *The California Wine Industry: A Study of the Formative Years* (1951) p. 25 (California Wine Industry); see also Fanshawe, *Liquor Legislation in the United States and Canada* (1892) p. 308.)

In response to the general threat to the food and beverage supply, many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages. (See, e.g., *Digest of the Pure Food and Drug Laws*, Sen. Rep. No. 3, 57th Cong., 1st Sess. (1901).)¹⁴ The vast majority of the resulting general "pure food" statutes broadly covered liquors and wines, as well as the mislabeling of those products.

¹⁴ Some state laws of this era regulated the production and labeling of specific items of food such as flour, butter, oleomargarine, and vinegar. (E.g., Hutt & Hutt, *A History of Government Regulation of Adulteration and Mishbranding of Food* (1984) 39 *Food Drug Cosm. L.J.* 2, 42-44 [citing and describing early Virginia statutes].) During this same period, Congress enacted similar laws concerning specific food items such as tea, oleomargarine, and meats. (*Id.*, at pp. 45-46.)

For example, in 1879 Wisconsin enacted a general pure food, drugs, and liquors statute, making it illegal to manufacture or sell any food (defined to include "drink"), accompanied by "any label, mark or device whatever, so as and with intent to mislead or deceive as to the true name, nature, kind and quality thereof" (1879 Wis. Laws, ch. 248, § 3, p. 502.) A similar labeling law was enacted in North Dakota. (1903 N.D. Laws, ch. 6, §§ 1-2, pp. 9-10; 1905 N.D. Laws, ch. 11, §§ 1-2, pp. 19-20.) An Ohio statute, enacted in 1884, made it illegal to manufacture or sell any food (defined to include drink) "if by any means it is made to appear better or of greater value than it really is," or if it contains any impure substance not "distinctly labeled" as such. (1884 Ohio Laws, § 3, p. 67; 1890 Ohio Laws, § 3, p. 248.) Substantially similar labeling statutes were enacted in Indiana, Massachusetts, Michigan, Pennsylvania, and Washington. (1899 Ind. Acts, ch. 121, § 1, pp. 189-190; 1882 Mass. Acts, ch. 263, §§ 1-3, pp. 206-207; 1895 Mich. Pub. Acts, No. 193, § 3, p. 358; 1895 Pa. Laws, No. 233, § 3, p. 317; 1899 Wash. Laws, ch. 113, §§ 1-3, pp. 183-184.) A Maryland statute, enacted in 1890, required that food or drink "be so manufactured . . . or sold, or offered for sale under its true and appropriate name" and required that the purchaser be "fully informed by the seller of the true name and ingredients . . . of such article of food or drink" (1890 Md. Laws, ch. 604, § 1, p. 733.) Similar laws were enacted in Connecticut, North Carolina, and Tennessee. (1895 Conn. Pub. Acts, ch. 235, §§ 1, 2, p. 578; 1895 N.C. Sess. Laws, ch. 122, §§ 1, 2, 5, pp. 176-178; 1897 Tenn. Pub. Acts, ch. 45, §§ 1, 4, pp. 177-178.) Finally, a New York statute (1893 N.Y. Laws, ch. 338), subsequently amended in 1903 and 1905, prohibited "adulterated or misbranded food." The statute defined as "misbranded"--and illegal--any food or beverage "package . . . or label" that bore "any statement regarding the ingredients or the substances contained therein, which statement [is] false or misleading in any particular, or if the same is *falsely branded as to the state or territory in which it*

is manufactured or produced . . ." (1903 N.Y. Laws, ch. 524, § 1, p. 1192, italics added; 1905 N.Y. Laws, ch. 100, § 1, p. 141.) A substantially identical labeling law was enacted in South Dakota. (§§ 1905 S.D. Laws, ch. 114, 6, 8 & 10, pp. 162-163.)¹⁵

b. *Early state wine labeling statutes*

As early as 1860, California enacted a statute to penalize the sale of "adulterated alcoholic or spirituous liquors, wines, cider, beer, or other liquid used as a beverage." (Stats. 1860, ch. 223, § 2, p. 186, currently *Pen. Code*, § 382.) But in the face of rampant deception in the labeling of wines—including the bottling of California wines under false foreign labels, and the bottling of inferior foreign wines under California labels (Cal. Wine Industry, *supra*, at p. 25) the California Legislature in 1866 passed a resolution asking Congress to enact nationwide legislation to curb the marketing of "spurious" and "imitation" wines and alcohols. (Sen. Conc. Res. No. 36, Stats. 1866 (approved Apr. 2, 1866) p. 908.) After much effort during the ensuing two decades, this endeavor ultimately failed in 1886. (See Cal. Wine Industry, *supra*, at pp. 154-155.)

Congress's inability to adopt a nationwide wine regulation and labeling statute induced the three primary wine-producing states--California, New York, and Ohio¹⁶--as well as other

¹⁵ Citing only the 1895 North Carolina law, Bronco asserts that "some" of these state laws were intended to apply only to food and beverages sold within a given state. The North Carolina provision, however, is the only such law of which we are aware to have intimated or specified such a limitation; none of the other laws cited above was so confined, and most instead broadly applied to foods and beverages that were "manufactured for sale"--wherever that sale would occur. But in any event, the relevant point is that the states (most of them broadly, and in the case of North Carolina, narrowly) exercised their traditional police powers by specifically regulating the labeling of food products and beverages, including wines.

¹⁶ As of 1890, those three states produced approximately 60, 10, and 8

states with lesser wine industries (such as Arkansas, Colorado, and Oregon)¹⁷ to enact, under their traditional police powers, specific and detailed statutes tailored to the problems of impurity and deception in the production and labeling of wines.

California--then, as now, by far the leading producer of wine in the nation,¹⁸ and an acknowledged leader in quality as well¹⁹--apparently was the first state to adopt such a statute, in March 1887. (Stats. 1887, ch. 36, p. 46 et seq.; see *Ex parte Kohler, supra*, 74 Cal. 38, 42-43.) The California statute defined as "pure wine" that which was made from only pure grapes. (Stats. 1887, ch. 36, § 1, p. 46.) The statute further defined "[d]ry wine" as that produced by "complete fermentation of saccharine contained in [grape] must"; "[s]weet wine" as that which contains "saccharine appreciable to the taste"; "[f]ortified wine" as "wine to which distilled spirits have been added"; and "[p]ure champagne, or sparkling wine" as that which "contains . . . effervescence produced only by natural fermentation of saccharine matter of [grape] must, or partially fermented wine in bottle." (*Id.*, § 1, p. 47.) The statute prevented the use or introduction of

percent, respectively, of the wine produced in the United States. (U.S. Dept. of Interior, Census Off., Rep. of Statistics of Agriculture in the U.S. at the 11th Census: 1890 (1895) p. 602.)

¹⁷ See Pinney, *A History of Wine in America* (1989) pages 404-405, 420-422 (describing early winemaking in Arkansas and Oregon).

¹⁸ As observed *ante*, footnote 16, by 1890 California produced most of the wine grown and made in the United States. Today, according to the Wine Institute, California produces more than 90 percent of the nation's wine. (See <http://www.wineinstitute.org/communications/statistics/wine_production_key_facts.htm> [as of Aug. 5, 2004].)

¹⁹ See, generally, California Wine Industry, *supra*, at pages 26 ("the French viticultural journal, *Revue Viticole*, in 1862, credited California with being the only wine-producing area of North America capable of competing with the product from Europe") and 133 (noting that 35 medals were awarded to California wines at the Paris Exposition Universelle in 1889).

impure "substitutes for grapes" or coloring, or foreign fruit juices "not the pure product of grapes," and further barred the use of preservatives such as "salicylic acid, glycerin, alum, or other chemical antiseptics." (*Id.*, § 2, p. 47.) The statute also provided for inspection of wine samples and for the use of bottleneck seals and label certificates (*id.*, § 7, pp. 48-49), and required either the statement "Pure California wine" (together with the maker's name) or the label certificate to be affixed to each bottle of pure wine. (*Id.*, § 8, p. 49.)²⁰ This court's decision in *Ex parte Kohler*, *supra*, 74 Cal. 38, rejected constitutional challenges to the act and concluded that, like legislation designed to ensure the marketing of pure milk and safe meats, the statute was a proper exercise of the state's police powers. (*Id.*, at pp. 41-42.)²¹

Colorado quickly followed in April 1887 with its own statute regulating the "manufacture or sale" of wine and other alcoholic beverages.²² New York adopted its own wine labeling statute in June 1887.²³ Two years later Ohio adopted

²⁰ In addition—and belying Bronco's claims that this and similar statutes lacked detail—the statute contained various other provisions dealing comprehensively with the production and labeling of wine. (See Stats. 1887, ch. 36, §§ 3-6, pp. 47-49.)

²¹ The *Ex parte Kohler* decision proceeded to construe the act's labeling requirements as prohibiting the sale of wines not meeting the definition of pure wines under the act, but as not subjecting to penalty a merchant who sells wine that is pure but lacks the required labels. (*Ex parte Kohler*, *supra*, 74 Cal. at pp. 44-45.)

²² (1887 Colo. Sess. Laws, § 2, p. 18 et seq.) The legislation required that wine be "pure"—defined as made from "the juice of the grape"—and specified that "[n]o vinous . . . liquors shall be offered or exposed for sale in this State, unless the . . . package, containing such liquors, shall be plainly" marked with "the words 'pure' wine," and displaying "the name or brand of the particular kind of wine so offered or exposed." (*Id.*, §§ 3 & 4, pp. 18-19.)

²³ (1887 N.Y. Laws, ch. 603, p. 814 et seq.) The New York law was designed to address its specific regional needs as reflected in the industry practices of New York winemakers who, like those in Europe and other areas of the United States but unlike those in California, often found it

a law that expanded upon the three wine labeling statutes described above.²⁴ Arkansas adopted a wine labeling statute in 1897,²⁵ and in 1905 Oregon adopted its own wine labeling statute.²⁶

necessary to add sugar in the production of their wines. The law defined and made illegal adulterated wine, and thereafter defined and required the proper labeling of "pure wine," "half wine," and "made wine." (*Id.*, §§ 1-4, pp. 814-816.)

As Bronco observes, the New York provision, as codified in 1889 (N.Y. Pub. Health Law, ch. 25, art. III, §§ 46-49 (Birdseye 1889)), referred, in its definition of adulterated wines, to those "offered for sale or manufactured with intent to sell within this state." (*Id.*, § 46.) Bronco asserts this and similar phrasing in the statute's penalty provision (*id.*, § 49) suggests the New York statute was intended to apply only to wines sold within the state. There is no evidence that the similar California law mentioned above, or the Ohio law mentioned below, was so confined or intended. But in any event, the relevant point is that New York--like the other states--exercised its traditional police powers by specifically regulating the labeling of wines.

²⁴ (1889 Ohio Laws, p. 96 et seq.; 1891 Ohio Laws, p. 231.) As amended in 1891, the Ohio law defined three versions of permitted wine: "pure wine," "wine," and "compound wine," and specifically allowed sugar to be added to the latter two products. The statute provided that each type of wine "shall be . . . labeled, designated and sold" as such and made it illegal to label or package, in a manner "calculated to mislead or deceive any person, or cause to be supposed that the contents thereof be pure wine," any product not meeting the definition of pure wine. (1891 Ohio Laws, §§ 2-4, pp. 231-233.)

²⁵ (1897 Ark. Acts, act 42, § 4, p. 108.) As subsequently amended (1899 Ark. Acts, act 80, pp. 137-138) and codified (Stats. of Ark., ch. 103, § 5101 (Kirby 1904)), the statute provided: "All wine sold in this State shall, before sale, be labeled so as to truly designate its kind and quality. Nothing but the pure fermented juice of the grape shall be labeled 'Natural Wine.' Wine to which sugar has been added before fermentation shall be labeled 'Sugared Wine.' The label shall also state if the wine be sweetened or unsweetened."

²⁶ (1905 Or. Laws, ch. 209, p. 347 et seq.) The Oregon law defined and barred "adulterated wine," allowed certain amounts of sugar to be used in the production of "pure wine," and defined and permitted "half wine" and "made wine," so long as those products were labeled as such. (*Id.*, §§ 54-

c. *Relevant federal law in the early 20th century: A failed wine statute; adoption of the Pure Food and Drugs Act of 1906; administrative "food standards"; and "Food Inspection Decisions"*

Far from supplanting these early efforts by the states, Congress in 1906 at first attempted but failed to enact a federal wine labeling statute similar to those adopted by the states.²⁷ As explained below, later in the same session Congress did enact a general pure food and beverage statute, but the resulting federal scheme produced no enforceable wine labeling regulation.

Congress's 1906 federal Pure Food and Drugs Act (Pub. L. No. 59-384 (June 30, 1906) 34 Stat. 768 (hereafter sometimes the 1906 Act)) borrowed substantially from the preceding state food and beverage legislation. Like the earlier New York statute described above (*ante*, pt. II.B.1.a.), the federal act defined as "misbranded"—and illegal—any food or beverage "package . . . or label" that bore "any statement,

56, pp. 361-362.)

²⁷ See Hearing before the House Committee on Ways and Means on House Resolution No. 12868, 59th Congress, 1st Session, at pages 1-60 (Feb. 1, 1906) (February hearings); Second Hearing before the House Committee on Ways and Means, 59th Congress, 1st Session, at pages 61-114 (Apr. 6 & 10, 1906) (April hearings). The proposed legislation would have defined wine as "pure," "carbonated," or "artificial," and required labeling as such. (Feb. hearings, *supra*, at pp. 5-7.) During a second committee hearing concerning the bill and a revised version of the bill, the committee made clear that in considering the proposed federal legislation it had consulted the related wine laws of France, Italy, Germany, Ohio, New York, "and other states." (Apr. hearings, *supra*, at pp. 62, 73, 101, 109-112.)

A recurring theme during the hearings was the harm posed to the wine industry by the sale of "sophisticated and fabricated wines." The proponents' stated concern was that if the sale of such products were "allowed or countenanced . . . in time honest wine will be driven from the market, . . . to the injury of the vineyardists . . ." (Apr. hearings, *supra*, at p. 66; see also *id.*, at pp. 73-74, 102.) That wine labeling legislation, however, died in committee.

design, or device regarding . . . the ingredients or the substances contained therein, which [is] false or misleading in any particular, and [] any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced." (Pub. L. No. 59-384, § 8 (June 30, 1906) 34 Stat. 770.)

Also like the previous general pure food and beverage laws of the states, the 1906 federal Act applied to food and "drink" (Pub. L. No. 59-384, § 6 (June 30, 1906) 34 Stat. 769), which in turn was construed to include wine. (See *United States v. Sweet Valley Wine Co.* (N.D. Ohio 1913) 208 F. 85, 87 (*Sweet Valley*).) The 1906 Act directed three department secretaries--the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor--jointly to adopt regulations "for carrying out the provisions of this Act." (Pub. L. No. 59-384, § 3 (June 30, 1906) 34 Stat. 768-769.)

As commanded by Congress, in October 1906 the three department secretaries jointly adopted a set of regulations under the 1906 Act. (See U.S. Dept. of Agriculture, Circular No. 21, reprinted (as amended through 1909) in Thornton, *The Law of Pure Food and Drugs, National and State* (1912) pp. 843-860 (Law of Pure Food and Drugs); see generally Hayes & Ruff, *The Administration of the Federal Food and Drugs Act* (1933) 1 Law & Contemp. Probs. 16, 20 (*Administration of the Federal Food and Drugs Act*).) One provision of those regulations governed the labeling of foods and beverages and prohibited, among other things, false or misleading statements concerning a product's "place [of] origin." (Circular No. 21, *supra*, Reg. 17(d), reprinted in Law of Pure Food and Drugs, *supra*, at p. 851.)

Implicitly acknowledging, as it must, that "[p]rior to the repeal of Prohibition, no agency of the Federal Government was provided with statutory authority to regulate the labeling . . . of alcoholic beverages specifically" (Russell, *Controls Over Labeling and Advertising of Alcoholic Beverages* (1940)

7 Law & Contemp. Probs. 645, 645 (*Controls Over Labeling*)), Bronco's supplemental brief points to (i) separate "food standards" (including wine standards) adopted solely by the Secretary of Agriculture in the two years prior to enactment of the 1906 federal Pure Food and Drugs Act, and (ii) two "Food Inspection Decisions" (hereafter sometimes F.I.D.), one issued solely by the Secretary of Agriculture and the other issued jointly by the three secretaries. (See Standards of Purity for Food Products (June 26, 1906) Circular No. 19, reprinted in Westervelt, *American Pure Food and Drug Laws* (1912) pp. 61, 78-79 (*American Pure Food and Drug Laws*); F.I.D. No. 109 (Aug. 21, 1909) & F.I.D. No. 120 (May 13, 1910), both reprinted in *American Pure Food and Drug Laws*, *supra*, at pp. 212-214.) As explained below, under federal law the cited food standards (including the wine standards) were merely advisory, and not legally binding, and with respect to the cited Food Inspection Decisions, the first was nonbinding and the second, even if binding, did not demonstrate federal control over the labeling of wines.

The cited food standards had been created at the behest of Congress, which in 1902 and 1903 directed the Secretary of Agriculture to undertake numerous projects, including one "to establish standards for purity of food products and determine what are regarded as adulterations therein, *for the guidance of the officials of the various States* and of the courts of justice . . ." (Pub. L. No. 57-1008 (Mar. 3, 1903) 32 Stat. 1147, 1158, italics added; see also Pub. L. No. 57-139 (June 3, 1902) 32 Stat. 286, 296.) The resulting detailed food standards addressed more than 200 categories of food items, including salted meats, oatmeal, lemon and vanilla extract, olive oil, coffee, and--in part II.F.a.3 of the secretary's food standards--what Bronco characterizes as "detailed and comprehensive" standards for wine, dry wine, fortified dry wine, sweet wine, fortified sweet wine, sparkling wine, modified wine (a low-alcohol product made by the addition of sugar), and raisin

wine (a product made from pomace--dried, evaporated, or previously crushed grapes).

Contrary to Bronco's suggestions and representations, the Agriculture Secretary's food standards (and hence the wine standards contained therein) were not enforceable under the 1906 federal Pure Food and Drugs Act (which, as noted, required that enforcing regulations be adopted by *all three* named secretaries), or indeed under *federal* law at all. (See *United States v. St. Louis Coffee & Spice Mills* (E.D.Mo. 1909) 189 F. 191 [finding the food standards relating to vanilla extract unenforceable under the 1906 Act].) In view of the 1906 Act's "three secretaries" requirements for regulations and the resulting case law, the food standards proclaimed by the Secretary of Agriculture acting alone have been described by authoritative commentators as merely "advisory" and as being "for the guidance of officials and the trade but *not having the force and effect of [federal] law.*" (Salthe, *State Food, Drug and Cosmetic Legislation and its Administration* (1939) 6 Law & Contemp. Probs. 165, 167, *italics added*; see also Lee, *Legislative and Interpretative Regulations* (1940) 29 Geo. L.J. 1, 4-17 (*Interpretative Regulations*) [noting that despite many congressional attempts in the course of three decades to make the food standards enforceable, manufacturers "'could take 'em or leave 'em' without legal consequences" under *federal* law]; *Alcoholic Beverage Control Before Repeal*, *supra*, 7 Law & Contemp. Probs. 544, 553; cf. *Administration of the Federal Food and Drugs Act*, *supra*, 1 Law & Contemp. Probs. 16, 32, fn. 71.) Indeed, even the treatise upon which Bronco relies concurred on this point, characterizing those same food standards as "not controlling" under federal law. (See *American Pure Food and Drug Laws*, *supra*, at p. 60.) In view of this history, we must reject Bronco's suggestion that the cited food standards, and the wine standards contained therein, constituted enforceable federal regulations under the 1906 Act or were otherwise enforceable as a matter of federal law.

We reach similar conclusions with respect to the two Food Inspection Decisions cited by Bronco, issued in 1909 and 1910, respectively. The first Food Inspection Decision, approved by the Secretary of Agriculture acting alone, stated that Missouri and Ohio wines, which typically were produced by adding substantial amounts of sugar, "would properly be called a 'sugar wine'"--and that when made by the mixture of pomace, sugar, water, colorings and preservatives, such products should be called "'imitation wine.'" (F.I.D. No. 109, reprinted in *American Pure Food and Drug Laws*, *supra*, at p. 212.) The second cited Food Inspection Decision, issued under the signatures of the three department secretaries, essentially retreated from and modified the first and stated that in light of (and apparently in deference to) the fairly lax Ohio wine statute (see *ante*, fn. 24), which had long permitted the use of sugar in wine production, such "sugared" wines properly could be called "'Ohio Wine,' or 'Missouri Wine,' respectively, without further qualification." (F.I.D. No. 120, reprinted in *American Pure Food and Drug Laws*, *supra*, at p. 213.) Moreover, the decision stated, Ohio and Missouri imitation wines could be labeled as "'Ohio Pomace Wine,' or 'Missouri Pomace Wine.'" (*Id.*, at p. 214.)

These decisions reveal that the federal agency, far from exercising federal authority to control state practices by requiring adherence to the "detailed and comprehensive" wine provisions of the food standards cited by Bronco, instead completely ignored those federal standards and, in the second decision, actually *deferred* to the applicable state wine statute, which in turn codified long-standing and lenient regional winemaking practices.

In any event, contrary to Bronco's suggestion that these Food Inspection Decisions evinced federal control, the first cited decision, No. 109 (approved by the Secretary of Agriculture acting alone), did not constitute a regulation

under the 1906 Act and was merely advisory.²⁸ Because the second cited Food Inspection Decision, No. 120, was signed by all three secretaries it arguably qualified as an enforceable federal regulation under the 1906 Pure Food and Drugs Act. (See American Pure Food and Drug Laws, *supra*, at p. 17.) As noted above, however, in substance this assumed regulation merely acquiesced in and adopted fairly lax state (Ohio) law. It does not, therefore, support Bronco's implicit argument that federal regulatory authorities during this period exercised power to control wine labels in a manner different from that of the states.

For these reasons we reject Bronco's suggestion that the Secretary of Agriculture's food standards, including the detailed and comprehensive wine standards, constituted enforceable federal law, that F.I.D. No. 109 constituted an enforceable federal wine labeling regulation, or that F.I.D. No. 120 evinced anything more than federal acquiescence in state law. Based upon the material cited to us, we conclude that whatever federal regulation of wine labeling existed between the first decade of the 20th century and the advent of Prohibition was achieved only indirectly, on a case-by-case

²⁸ The very limited effect of such decisions was described by the issuing entity itself as follows: "*The opinions or decisions of this Department . . . are . . . issued more in an advisory than in a mandatory spirit. It is clear that if the manufacturers, jobbers, and dealers interpret the rules and regulations in the same manner as they are interpreted by this Department, and follow that interpretation in their business transactions, no prosecution will lie against them. . . . It may often occur that the opinion of this Department is not that of the manufacturer, jobber, or dealer. In this case there is no obligation resting upon the manufacturer, jobber, or dealer to follow the line of procedure marked out or indicated by the opinion of this Department. Each one is entitled to his own opinion and interpretation and to assume the responsibility of acting in harmony therewith. . . .*" (F.I.D. No. 44 (Dec. 1, 1906), reprinted in Gwinn, U.S. Dept. of Agriculture, Food and Drugs Act (1914) pp. 35-36, italics added; see also American Pure Food and Drug Laws, *supra*, at pp. 16-18; *Administration of the Federal Food and Drugs Act, supra*, 1 Law & Contemp. Probs. at pp. 20-21.)

basis, through prosecutions under the general misbranding provisions of the 1906 federal Pure Food and Drugs Act.²⁹ That relatively limited federal activity, however, neither erased nor eclipsed the previous quarter-century of state regulation described above. (*Ante*, pt. II.B.1.a. & b.)

Moreover, at the same time federal activity in this area was commencing, state activity was continuing and at least keeping pace. By 1906, nearly all of the states had exercised their traditional police powers to enact pure food and beverage laws, almost all of which covered drinks, including wine.³⁰ Even more importantly, as explained below, within a few years of 1906 the Secretary of Agriculture's food standards (including the detailed and comprehensive wine standards)--although remaining merely advisory and unenforceable under *federal* law--specifically were adopted as part of the general food laws of most states (including California). The perhaps ironic result was that the Secretary of Agriculture's wine standards were to become enforceable

²⁹ In addition to the federal prosecution under the 1906 Act that resulted in the decision in *Sweet Valley*, *supra*, 208 F. 85 in which the federal district court held that the challenged "pomace wine" product in that case, labeled as German "Select Riesling" and "Hochheimer," was misbranded under both the 1906 Act and the Ohio wine statute--we are aware of one similar wine mislabeling prosecution under the 1906 Act (*Sixty Barrels of Wine* (D.C.Mo. 1915) 225 F. 846) and three similar federal prosecutions concerning bottled "Champagne." (*Duffy-Mott Co. v. United States* (3d Cir. 1923) 285 F. 737; *Schraubstadter v. United States* (9th Cir. 1912) 199 F. 568; *United States v. Five Cases of Champagne* (N.D.N.Y. 1913) 205 F. 817.) One might ask why the *Duffy-Mott* case arose during Prohibition. The answer is that even during Prohibition, *pharmacists* were permitted to sell "prescription Champagne." (See Byszewski, *What's in the Wine? A History of the FDA's Role* (2002) 57 Food & Drug J. 544, 554.)

³⁰ See Hearings before the House Committee on Interstate and Foreign Commerce on the Pure-Food Bills, 59th Congress, 1st Session (Feb. 13, 1906) page 308. Indeed, according to contemporaneous assessments, those states with adequate enforcement mechanisms (approximately 20 states) were, by 1906, applying their laws "very rigidly." (*Ibid.*)

substantive law in most states under *state* law, even while they remained unenforceable as a matter of federal law.

d. *Relevant state law in the early 20th century: Adoption of California's place--name wine statute; California's Pure Foods Act and adoption of the food standards, including the wine standards; and corresponding labeling regulations*

Nothing in the 1906 federal Pure Food and Drugs Act implied that the existing and continuing state regulation of the misbranding of food and beverages was preempted by that federal legislation. Indeed, the act "disclose[d] very clearly that it [was] not intended to trench upon the powers of the states in any respect." (*Cleveland Macaroni Co. v. State Board of Health* (N.D.Cal. 1919) 256 F. 376, 379; see also *Savage, supra*, 225 U.S. 501 [upholding, against a claim of preemption, Indiana food and drug labeling regulations]; see generally Fisher, *The Proposed Food and Drugs Act: A Legal Critique* (1933) 1 Law & Contemp. Probs. 74, 75 & fn. 4 (*Proposed Food and Drugs Act*) [noting case law holding that states were permitted to prescribe "additional standards" and that "[c]ompliance with federal standards does not secure the right to interstate transportation free from 'reasonable' regulation by the state"].)

Soon after passage of the 1906 federal act, the California Legislature, in an apparent effort to combat the continuing problem of the labeling of California wines as foreign wines, adopted a statute requiring a "uniform wine nomenclature" that, for the first time, specifically regulated the use of place names on wine labels. The statute provided for "pure" California wines to be labeled with the "prefix 'Cal' or 'Cala' . . . as for example, 'Calclaret,' 'Calburgundy,' 'Calariesling,' etc., . . ." (Stats. 1907, ch. 104, § 1, pp. 127-128.) The statute further prohibited the use of any such label on wines other than pure California wines. It barred "labeling any vessel, bottle, . . . or package containing any liquid other than pure wine of California manufacture, . . . or any paper or brand in similitude or resemblance thereof, or any paper or brand of

such form and appearance as to be calculated to mislead or deceive any unwary person or cause him to suppose the contents thereof to be pure wine of California manufacture, origin or production" (*Id.*, § 2, p. 128.)

Following passage of the 1906 federal Pure Food and Drugs Act, states left in place or expanded (or in other instances enacted for the first time) their own statutes to address the problems of adulteration, misbranding, and mislabeling of food and beverages. (See generally American Pure Food and Drug Laws, *supra*, at pp. 260-1450; *Proposed Food and Drugs Act, supra*, 1 Law & Contemp. Probs. 74, 75 & fn. 4.) California, for its part, adopted such a general scheme in March 1907, addressing the problem of "adulterated, mislabeled or misbranded food, or liquor." (Stats. 1907, ch. 181, § 1, p. 208 (Pure Foods Act or 1907 Act).) That statute--like those of many other states--specifically adopted under *state* law the food standards (including the wine standards) that had been formulated by the Secretary of the United States Department of Agriculture, but which, as described above, were unenforceable under *federal* law. (Stats. 1907, ch. 181, § 3, p. 209.) Further going beyond anything set forth in the federal law, the state statute also made it illegal to, among other things, "*falsely brand[]*" any food or liquor concerning the "*county, . . . city, town, [or] state . . . in which it is manufactured, or produced*" (*id.*, § 5, p. 210, italics added),³¹ and provided that "[f]ood and liquor shall be deemed *mislabeled or misbranded* within the meaning of this act . . . [i]f the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in

³¹ In this respect, the author of the 1912 treatise relied upon by Bronco observed that "the prohibitions in the California statute . . . against misstatements as to geographical source" were "more detailed" than those under federal law. (American Pure Food and Drug Laws, *supra*, at p. 339.)

any particular.” (Stats. 1907, ch. 181, § 6, p. 210, italics added.)³²

Accordingly, as of March 1907 and continuing through the next three decades, California (like many other states)³³ had adopted specific and enforceable wine standards that exceeded federal law. During this same period--and indeed, until repeal of the 1906 federal Pure Food and Drugs Act in 1938--the Secretary of Agriculture's food standards remained unenforceable under federal law despite periodic attempts to

³² In early 1908, California's Department of Public Health adopted comprehensive regulations implementing the 1907 state Act, broadly regulating “for domestic commerce” the labeling of foods and beverages and specifically providing that “[t]he label shall be free from any statement, design, or device regarding . . . place of origin, which is false or misleading in any particular.” (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1909) Reg. 16, p. 22, italics added.) Those regulations, as periodically amended, continued in force through at least 1935. (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1928) Reg. 13(d) & (e), p. 20 [providing as quoted above, and further providing that food or beverages shall not be “labeled or branded in such a manner as to deceive or mislead the consumer”]; Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1933) Reg. 13(d) & (e), p. 18 [same].)

³³ See American Pure Food and Drug Laws, *supra*, listing, as of 1912, the following additional states that had adopted the Secretary of Agriculture's food (and wine) standards, or essentially identical standards: Alabama (at p. 270); Delaware (at p. 418); Florida (at p. 438); Georgia (at pp. 468-474); Idaho (at p. 499); Illinois (at pp. 524-525); Indiana (at p. 551); Kansas (at pp. 604-605); Kentucky (at pp. 634-635); Louisiana (at pp. 661-662); Maine (at pp. 680-681); Maryland (at pp. 705-706); Mississippi (at pp. 828-829); Missouri (at p. 851); Montana (at p. 880); Nevada (at p. 932); New Hampshire (at p. 952); New Jersey (at p. 980); North Carolina (at p. 1051); Oklahoma (at p. 1128); Rhode Island (at pp. 1207-1208); South Dakota (at p. 1241); Texas (at p. 1285); Utah (at p. 1306); Virginia (at pp. 1350-1351); Wisconsin (at pp. 1416-1417); and Wyoming (at p. 1441). (See also *Interpretative Regulations*, *supra*, 29 Geo. L.J. at p. 13 & fn. 27.)

provide otherwise. (See *Interpretative Regulations*, *supra*, 29 Geo. L.J. 1, 6-17.)³⁴

e. *California's post-Prohibition-repeal wine labeling regulations*

With the advent of Prohibition, which became effective on January 29, 1920 (*U.S. Const., 18th Amend.*), the California wine industry fell into a dormant phase, awakening upon repeal of Prohibition in December 1933 through adoption of the *Twenty-first Amendment to the federal Constitution*. At least two years prior to adoption of the FAA Act in August 1935--and indeed before, and in anticipation of, the repeal of Prohibition--the California Legislature, exercising both its traditional police powers and its authority under newly enacted *article XX, section 22* of the state Constitution,³⁵ adopted as an interim measure the State Liquor Control Act (Stats. 1933, ch. 178, p. 625 et seq.; *id.*, ch. 658, p. 1697 et seq.) and thereafter adopted the California Alcoholic Beverage Control Act (ABC Act), which went into effect on June 13, 1935. (Stats. 1935, ch. 330, p. 1123 et seq.; see *Bus. & Prof. Code, § 23000 et seq.*)³⁶

³⁴ Effective through at least 1935, the state's 1907 Pure Foods Act continued to adopt--as *minimum* standards--the federal food standards (including the wine standards). (Stats. 1933, ch. 758, § 10, pp. 2001-2002.)

³⁵ In 1932, anticipating ratification of the repeal of Prohibition, California voters passed a constitutional amendment, providing as follows: "The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate *the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. . . .*" (*Cal. Const., art XX, § 22*, italics added.)

³⁶ At that same time, the Legislature repealed the 1907 "Cala" wine labeling statute. (See Stats. 1935, ch. 330, § 69, p. 1152; Caddow, *Permanent Wine Labeling Regulations*, (Feb. 1936) *Wines & Vines* 10.)

Meanwhile, in late December 1934--before adoption of any federal regulation applicable to wine labels--California, acting through its Department of Public Health, Bureau of Food and Drug Inspections, and pursuant to its own 1907 Pure Foods Act (Stats. 1907, ch. 181, §§ 5 & 6, p. 210), adopted regulations concerning "Definitions and Standards--Wines." (Cal. Dept. of Pub. Health, Bur. of Food and Drug Inspection, Regs. adopted Dec. 31, 1934, amended April 13, 1935, as printed Jan. 18, 1936 (1934 Regulations).) A preamble set forth in broad terms the purpose and scope of the regulations. The stated goal was to protect both "the consuming public" and "the wine industry as a whole." (1934 Regs., at p. 1.)³⁷ To this end, the regulations adopted specific chemical definitions for dry red wines, dry white wines, and sweet wines (*id.*, at pp. 1-2), similar in substance to the standards incorporated into the state's 1907 Pure Foods Act, and which, as explained *ante*, part II.B.1.d, had by then been in place in California (and numerous other states) for nearly 30 years. The 1934 Regulations also established strict and detailed labeling requirements for sparkling and artificially carbonated wines (1934 Regs., at p. 2)³⁸ and for still wines

The 1887 state "pure wine" labeling statute (Stats. 1887, ch. 36, p. 46) previously had been repealed in 1911. (Stats. 1911, ch. 587, § 1, p. 1110.) Of course, despite these repeals, the state's 1907 Pure Foods Act (Stats. 1907, ch. 181, p. 208 et seq.), which as noted above incorporated specific wine standards, and the regulations adopted under the 1907 Act (all described *ante*, pt. II.B.1.d.), remained in effect and prohibited the mislabeling of wine.

³⁷ Contrary to assertions in Bronco's supplemental briefs, there is no indication that the scope of the 1934 regulations was limited to wine sold to consumers in California and that the regulations did not address wines destined for interstate commerce.

³⁸ The regulation provided: "*Champagne* is a light white sparkling wine identical with champagne as made in the Champagne district in France in respect to composition and basic manufacturing principle. If the secondary fermentation is not within the bottle, there shall be stated in direct conjunction with the word 'Champagne' the words 'Secondary Fermentation in Bulk.'" (1934 Regs., at p. 2.) The regulations also

(*id.*, at pp. 2-3). In the latter respect, the regulations addressed the decades-old problem of California wines being labeled with foreign place names such as "Burgundy." The state regulations allowed the unqualified use of that name and similar French place names "only [for] products from France," and provided that a wine would be "regarded as *misbranded*" (and hence in violation of the state's 1907 Act and ensuing regulations described *ante*, pt. II.B.1.d.) if the label read "Burgundy" (or any other foreign place name) and the wine was not produced there, unless the label also "displayed with prominence equal to that" of the foreign place name, "the name of the state or country where the wine is produced." (*Ibid.*, italics added.)³⁹

Bronco insists that these various state regulations, viewed as a whole, "did not represent any innovation by California" and that "similar, albeit more detailed and comprehensive . . . standards already had been adopted nearly thirty years before by federal regulators." As explained *ante*, part II.B.1.c, however, the historic record does not support Bronco's claim. The standards to which Bronco refers never were enforceable under federal law, but in fact, by 1907, they had become part of the substantive (and enforceable) law of California--and within a short time, of most other states as well. In other words, the touted innovation (enforceable wine labeling standards) was accomplished by California and other states, and not by the federal government.

f. *Initial (and short-lived) federal wine labeling regulations issued by the Federal Alcohol Control Administration*

provided specific labeling requirements for artificially carbonated wines: "The word 'carbonated' should be in the same color [and] style of type on the same colored background as the wine described." (*Ibid.*)

³⁹ The regulations also restricted the use, on wine labels, of statements of age and the word "old" (1934 Regs., at pp. 2-3), and further required that any product made from pomace be labeled "IMITATION WINE/ Made of Wine Pomace, Water and Sugar" (*id.*, at p. 2).

As Bronco emphasizes, a few months after adoption of the 1934 California wine labeling regulations, federal wine labeling regulations (which, as explained below, proved to be short-lived and never became effective) were for the first time adopted in late March 1935 by the recently created Federal Alcohol Control Administration (FAC Administration), which had been established by executive order under the National Industrial Recovery Act (15 U.S.C. § 703). (See Harrison & Lane (1936) *After Repeal*, p. 24 (*After Repeal*).) The FAC Administration's regulations, like the numerous similar state food and beverage regulations that preceded them, were directed against, among other things, "misbranding"--the false or misleading labeling of alcoholic beverages. (See FAC Admin., *Misbranding Regs.*, Series 7, Regs. Relating to the Labeling of Wine (Mar. 25, 1935), § 3(b)(3) (*Misbranding Regulations*) [a wine bottle is misbranded if its label "tends to create a misleading impression of the wine"]; see generally O'Neill, *Federal Activity in Alcoholic Beverage Control* (1940) 7 *Law & Contemp. Probs.* 570, 572; *After Repeal*, *supra*, at pp. 27-29.) Nowhere in these nascent federal regulations was there any suggestion that they preempted stricter state regulations. In any event, within two months of their adoption and prior to their effective date (see *Misbranding Regulations*, *supra*, § 1(a)(3)), the federal regulations became unenforceable in late May 1935 after the United States Supreme Court invalidated as unconstitutional similar "fair competition" codes adopted under the National Industrial Recovery Act. (*Schechter Corp. v. United States* (1935) 295 U.S. 495, 541-542 [79 L. Ed. 1570, 55 S. Ct. 837].)

g. *Continuing regulation by other states*

Despite the initial failure of federal regulation of wine labels, regulation by the states continued in and through 1935. In addition to California's then long-established general food and beverage regulations, and its then recent specific wine regulations, described *ante*, part II.B.1.d-e, the Ohio and

Oregon wine labeling statutes, described above (*ante*, fn. 24 & 26), still were in effect⁴⁰ and most other states had food and beverage statutes, the majority of which regulated mislabeling or misbranding of beverages, including wine. As already explained, many of those statutes adopted specific and comprehensive wine standards that were enforceable only under state, and not federal, law--and as of 1935, many had been revised specifically to bar misrepresentations on labels concerning the place of manufacture or production.⁴¹

⁴⁰ The original Ohio wine law (1889 Ohio Laws, p. 96 et seq.) was, by 1938, codified in Page's Ohio Revised Code Annotated (Anderson 1938) title II, chapter I, sections 5795-5805. Oregon's 1905 wine labeling statute (1905 Or. Laws, ch. 209, §§ 54-56, pp. 361-362) was reenacted a decade later (1915 Or. Laws, ch. 343, §§ 41-43, pp. 570-571) and apparently still was effective through mid-1937, when Oregon adopted post-Prohibition-repeal wine labeling regulations. (See also Or. Liquor Control Admin. (1937) Regs. 5(c) [specifically enforcing the California wine regulations discussed above] & 6 [setting forth labeling requirements].)

⁴¹ For example, the food and beverage labeling statutes of Massachusetts, North Dakota, and Washington, described *ante*, part II.B.1.a, each remained in force in 1935, as revised, and each defined as "misbranded" any food or drink label bearing "any statement, design or device" that was "false or misleading in any particular," or any item "falsely branded as to the state or country where it was manufactured or produced," or very similar words to that effect. (See 1932 Mass. Gen. Laws, ch. 94, §§ 186, 187; 1923 N.D. Laws, ch. 222, §§ 4, 6, pp. 289-291; Rev. Stats. of Wash. (Remington 1932) tit. 40, §§ 6145, 6147; see also Rev. Stats. of Wash., *supra*, § 6137 [adopting the federal food standards, including wine standards, as minimum standards].)

In New York, Colorado, and Arkansas, the previous wine-specific labeling statutes described *ante*, part II.B.1.b, had given way, by 1935, to the states' respective general food and beverage mislabeling/misbranding regulations, all of which regulated both food and drink. (See N.Y. Agric. & Mkts. Law, ch. 1, art. 17, § 200 (Cahill 1930); Ann. Stats. of Colo., ch. 1, § 6 (Courtright 1930); Stats. of Ark., ch. 69, § 4823 (1919).) There is no indication, with respect to any of these changes in the various states' laws, that any diminution of state regulatory authority over the labeling of wines thereby was intended or effected.

2. *Propriety of imposing a presumption against preemption in this case*

In light of the history set forth above, we disagree with Bronco's assertion, advanced in its original brief in this court, that federal regulation of wine labeling prior to Congress's adoption of the FAA Act in August 1935 was "well established," and that "[b]y contrast, the states' regulation of wine labeling . . . ranged from limited to none." Nor do we agree with the accusation of amici curiae Abundance Vineyards et al. that the Department and the NVVA have "suggested, *misleadingly*, that the States, and not the Federal government, historically played the dominant role in the regulation of the alcoholic beverage industry before enactment of the FAA Act." (*Italics added.*) Based upon our review of the relevant history, we conclude that from the mid to late 19th century until shortly after the repeal of Prohibition, the states' exercise of their traditional police power to regulate the labeling of food--including wine and other alcoholic beverages--was both extensive and dominant. This historic evidence demonstrates that when, as described below, Congress finally entered the specific field of wine label regulation in August 1935 by enacting the FAA Act, under which the federal regulation here at issue was promulgated, Congress was legislating in a field "traditionally regulated by the States." (*ARC America Corp., supra*, 490 U.S. 93, 101, and cases cited.)⁴² Accordingly, a strong

⁴² For the reasons set forth above, we also reject Bronco's related assertion, pressed in its supplemental briefs and at oral argument, that no presumption against preemption applies here because, Bronco claims, the states' regulatory activity was augmented in the early 20th century by a "significant federal presence." (See *Locke, supra*, 529 U.S. 89, 108 [finding no presumption against preemption regarding regulation of maritime vessels].) As explained *ante*, part II.B.1, prior to adoption of the *FAA Act in 1935*, the federal role with respect to wine label regulation was neither dominant nor particularly significant in comparison with that of the states--and in any event, unlike the situation in *Locke*, federal activity in the field of wine label regulation certainly was not "manifest since the beginning of our Republic." (*Locke, supra*, at p. 99.)

presumption against preemption applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

We turn now to consider whether, as Bronco claims, there was, at the time of the enactment of the *FAA Act* or thereafter, a clear and manifest intent on the part of Congress to preempt wine labeling regulation by the states such as is found in section 25241. We find no such intent. We thereafter consider whether, as Bronco claims, section 25241 is impliedly preempted by federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines, supra*, 312 U.S. 52, 67.) As we explain, we find no such implied preemption.

C.

1. *Whether Congress, when it enacted the FAA Act in 1935, intended to preempt state wine labeling regulation*

As explained below, contrary to Bronco's assertions the history of the 1935 *FAA Act* discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

In late August 1935, Congress replaced the defunct FAC Administration with the Federal Alcohol Administration Act. (Pub. L. No. 74-401 (Aug. 29, 1935) 49 Stat. 977, presently 27 U.S.C. § 201 *et seq.*) The essential aspects of the *FAA Act* exist today in substantially unamended form and remain the basis for federal regulation of wine labeling. (See Benson, *Regulation of American Wine Labeling: In Vino Veritas?* (1978) 11 U.C. Davis L. Rev. 115, 154 *et seq.* (*Regulation of American Wine Labeling*).)

Substantively, the *FAA Act* in large measure emulated the main aspects of the invalidated FAC Administration. (After

Repeal, *supra*, at p. 32; *Regulation of American Wine Labeling, supra*, 11 U.C. Davis L. Rev. 115, 165.) The *FAA Act* makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury.⁴³ (27 U.S.C. § 203(a) & (b).) Title 27 *United States Code* section 205(e)--the primary federal statutory provision for present purposes--directs the Secretary of the Treasury to promulgate such regulations "with respect to packaging, marking, branding, and labeling . . . (1) as will prohibit deception of the consumer with respect to [alcoholic beverage] products . . . ; [and] (2) as will provide the consumer with adequate information as to the identity and quality of the products" (Italics added.) To enforce these requirements, this section of the *FAA Act* also requires that any person who sells or ships wine in interstate or foreign commerce first obtain from the Secretary of the Treasury (or his or her designee) a certificate of label approval, or COLA, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury, through issuance of a COLA. Finally, the section further provides that no wine label may be removed or altered "except as authorized by Federal law" or except pursuant to federal regulations

⁴³ As originally enacted, the statute referred to the "Administrator" of the "Federal Alcohol Administration." That agency was abolished, and its functions were directed to be administered by the Secretary of the Treasury through the Bureau of Internal Revenue (now the Internal Revenue Service) in the Department of the Treasury. (See 27 U.S.C. § 201, Transfer of Functions.) Thereafter, the Bureau of Alcohol, Tobacco and Firearms (BATF) was established in 1972 and given the pertinent functions of the Internal Revenue Service with regard to wine regulation. (*Ibid.*) Subsequently, the Homeland Security Act of 2002 (6 U.S.C. § 101) transferred responsibility for the regulation of interstate commerce in alcoholic beverages to a newly formed Alcohol and Tobacco Tax Trade Bureau within the Department of the Treasury. (68 Fed.Reg. 3744 (Jan. 24, 2003).) For convenience, and because the regulations here at issue were adopted by the BATF, we shall continue to refer in this case to the BATF as the responsible regulatory agency.

"authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law." (*Ibid.*)

Testifying in support of the legislation that became the *FAA Act*, Joseph H. Choate, former Chairman of the FAC Administration, explained that the goal was to continue the work of the recently invalidated FAC Administration. Adverting to the regulations mentioned above that recently had been adopted by the FAC Administration (*ante*, pt. II.B.1.f.), Mr. Choate explained that the purpose of those regulations--and of the new *FAA Act*--was to "to provide such regulations, not laid down in statute, so as to be inflexible, but laid down under the guidance of Congress, under general principles, by a body which could change them as changes were found necessary. *These regulations were intended to insure that the purchaser should get what he thought he was getting, that the representations both on labels and in advertising should be honest and straightforward and truthful. . . . [The consumer] should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle.*" (Hearings before House Com. on Ways and Means on H.R. No. 8539, 74th Cong., 1st Sess., p. 10 (1935), testimony of Joseph H. Choate, italics added.) Similarly, Representative Thomas Cullen of New York, the author of the bill that became the *FAA Act* (see 79 Cong. Rec. (1935) 11713 et seq., 11726), promoting his legislation on the floor of the House, asserted that the proposed bill was necessary in order to "do something to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by dishonest labeling" (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714; see generally *Regulation of American Wine Labeling*, *supra*, 11 U.C. Davis L. Rev. 115, 165-167.)

As with the 1906 federal Pure Food and Drugs Act, and by contrast to other legislation passed only days prior to

adoption of the FAA Act in August 1935,⁴⁴ nothing in the body of the *FAA Act* reveals congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police powers. As already explained, at the time Congress adopted the *FAA Act in August 1935*, the states, led by California (see *ante*, pt. II.B.1.d. & e.), were continuing to exercise their traditional police powers in this area. (See *ante*, pt. II.B.1.g., describing the then extant statutes of various states.)

Consistently with this history and contemporaneous practice, the bill's author, Representative Cullen, while promoting the bill embodying the *FAA Act* on the floor of the House, emphasized the cooperative, as opposed to preemptive, nature of the federal legislation. He asserted: "[W]e must do something to *supplement* legislation by the States to carry out their own policies. The liquor industry is too big and the constitutional and practical limitations on the States are so considerable that *they alone cannot do the whole job*." (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714, italics added; accord, H.R. Rep. No. 1542, 74th Cong., 1st Sess., pp. 2-3

⁴⁴ In the Tobacco Inspection Act (Pub. L. No. 74-314 (Aug. 23, 1935) 49 Stat. 731)—enacted six days prior to adoption of the *FAA Act*—Congress used language making very clear its intent to adopt "uniform" national standards that would displace state regulation, thereby revealing that when the 74th Congress intended to make its regulation exclusive, it knew how to do so. As observed in *Florida Avocado*, *supra*, 373 U.S. 132, 147, with regard to the Tobacco Act, "Congress had declared 'uniform standards of classification and inspection' to be 'imperative for the protection of producers and others engaged in commerce and the public interest therein.' [Citation.] The legislative history was replete with references to a need for 'uniform' or 'official' standards, which could harmonize the grading and inspection of tobacco at all markets throughout the country. Under the statute a single set of standards was to be promulgated by the Secretary of Agriculture, and the standards so established would be the official standards of the United States for such purpose." No such language or comparable provision appears in the *FAA Act*, as adopted in 1935.

(1935).)⁴⁵ Representative Cullen also assured the House that by enactment of the bill, “[n]o power is taken away from the States to provide such safeguards as they deem best for their own protection.” (79 Cong. Rec., *supra*, 11174.)⁴⁶

⁴⁵ See also House of Representatives Report No. 1542 (74th Cong., 1st Sess.), pages 13-14 (July 17, 1935) (citing the *FAA Act*’s “relabeling” provision and noting that anticipated regulations would permit “appropriate additional labeling requirements imposed by a State pursuant to its own law not in conflict with the Federal requirements”). Bronco asserts that by this relabeling provision (see 27 C.F.R. § 4.30(b)(1)) and the cited comment, Congress had in mind only the authority of states, pursuant to the *Twenty-first Amendment*, to impose additional labeling requirements on alcoholic products imported for sale from other states, and did not contemplate that a state would be permitted to impose additional labeling requirements on wines destined for interstate commerce. We find no persuasive evidence of any such intent, however.

⁴⁶ Although on occasion we have questioned reliance upon the views of individual legislators as a basis upon which to discern the intent of the state Legislature (e.g., *People v. Dennis* (1998) 17 Cal.4th 468, 501, fn. 7 [71 Cal. Rptr. 2d 680, 950 P.2d 1035], and cases cited), in the present case Bronco does not challenge Representative Cullen’s statements on that ground, and we recently observed in *Dowhal*, *supra*, 32 Cal.4th 910, that statements by a single member of Congress “‘can provide evidence of Congress’ intent.’” (*Id.*, at p. 926, fn. 6.) Moreover, in the present case there are strong reasons to rely upon the quoted statements. Representative Cullen was the author of the *FAA Act*, and was looked upon as an authority during the House debates, fielding many questions from his colleagues. (E.g., Remarks of Rep. Doughton, 79 Cong. Rec. (1935) 11713 [Rep. Doughton, author of a prior version of the bill, observing on the House floor that Rep. Cullen “is more familiar with the provisions of this bill than myself or perhaps any other member He has given much study to the bill and is better qualified to explain it than I am . . .”]; *id.*, pp. 11715-11718, 11727-11730, 11737, 11790, 11792-11793, 11797, 11799 [Rep. Cullen’s various responses to questions, etc.].) In addition, Representative Cullen’s comments essentially reiterated that which was set out in the House Report of the Ways and Means Committee, cited in the text above (and later incorporated into the Senate Report of the Committee on Finance on House Resolution No. 8870—see Fed. Alcohol Control Admin., Legis. History of Fed. Alcohol Admin. Act (Sept. 15, 1935), appen. IV, at p. 166), and hence the cited comments did not amount merely to expressions of personal opinion. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 590 [128 Cal. Rptr. 427, 546 P.2d 1371].)

Based upon this legislative history, and in light of the backdrop against which Congress acted--the prior decades of state legislation regulating the labeling or "misbranding" of wine as a general food and beverage product, or of wine specifically--we conclude that Bronco has failed to establish that Congress, at the time it enacted the *FAA Act*, acted with the "clear or manifest" purpose of preempting state statutes regulating wine labels.

2. Post-1935 congressional and regulatory agency intent to preempt state wine label regulation

Bronco further suggests that *subsequent* to the enactment of 27 *United States Code* section 205(e) in August 1935 and the adoption, by agencies within the Department of the Treasury, of implementing regulations, both Congress and the federal regulators manifested intent that the federal wine labeling regulations would preempt more stringent state wine labeling regulations. Applying again, as we must, a presumption against preemption in this context, we inquire whether Congress or the regulatory arm established within the Department of the Treasury evinced a clear and manifest intent to preempt state wine labeling regulations such as California's *section 25241*. In so doing, we keep in mind the entire history of state regulation of wine labeling and the history and language of the *FAA Act* described above. As explained below, after reviewing (i) the early federal regulations and early state regulations that imposed standards higher than the federal regulations, (ii) subsequent federal regulations and pronouncements recognizing the applicability of state labeling law, and state wine regulations enacted in the mid-1970s (especially certain Oregon regulations, one of which is substantively similar to the challenged *section 25241*), and (iii) a 1988 amendment to the *FAA Act*, concerning health warnings on alcoholic beverages, we continue to find no evidence of any clear or manifest intent on the part of Congress or the responsible federal agency to preempt state wine labeling regulation such as *section 25241*.

Indeed, the evidence demonstrates that the federal agency has long contemplated or at least acquiesced in concurrent and stricter state regulation.

a. *Federal and California regulations issued after passage of the FAA Act*

As noted above, prior to adoption of the *FAA Act* California had in place, by December 1934, specific and detailed wine regulations restricting, among other things, the use of place names on wine labels. (See *ante*, pt. II.B.1.e.) In bulletins and reports issued in the years immediately thereafter, the California Department of Public Health touted its enforcement of those state regulations, which it described as requiring the "honest labeling of wines."⁴⁷

In late December 1935, four months after adoption of the *FAA Act*, and one year after California's adoption of its own post-Prohibition-repeal wine labeling regulations, valid federal wine labeling regulations were approved, and those regulations became effective on March 1, 1936. (U.S. Dept. Treas., Fed. Alcohol Admin., Regs. No. 4 Relating to Labeling and Advertising of Wine (Dec. 30, 1935) arts. I-VII, 1 *Fed.Reg.* 83 (Apr. 1, 1936) (hereafter Regulations No. 4); see, generally, *Controls Over Labeling*, *supra*, 7 Law & Contemp. Probs. 645, 652, fn. 25 et seq.)

The federal labeling regulations, as amended in 1938 (see 3 *Fed.Reg.* 2093 (Aug. 26, 1938)) and thereafter, presently are designated 27 *Code of Federal Regulations*, sections 4.20 through 4.39. One key provision--Code of Federal Regulations section 4.25(b)(1)(i) and (iii)--states that a wine

⁴⁷ See California Department of Public Health, Weekly Bulletin (Feb. 19, 1938) page 14; *id.*, at page 13 (describing enforcement of the California wine quality standards and noting their adoption by the beverage control authorities in Oregon, Virginia, and Arizona); see also Thirty-sixth Biennial Report of the California Department of Public Health (Sept. 1940) page 177; Thirty-fifth Biennial Report of the California Department of Public Health (Sept. 1938) at page 142; Thirty-fourth Biennial Report of the California Department of Public Health (Sept. 1936) page 100.

is "entitled" to be described with an appellation of origin if "[a]t least 75 percent of the wine is derived from fruit ... grown in the appellation area indicated" and "it conforms to the laws and regulations of the named appellation area governing the *composition, method of manufacture, and designation* of wines made in such place." (Italics added.)⁴⁸

Soon after the adoption of this federal provision in 1938, a California statute was enacted, and two regulations were adopted, all three of which imposed *more stringent* California wine labeling requirements. First, in 1939, the Legislature amended the state ABC Act (*Bus. & Prof. Code*, § 23000 *et seq.*) to prohibit the use on wine labels of the phrase "California Central Coast counties dry wine," unless the wine was in fact made *entirely* from grapes grown in specified Central Coast counties. (Stats. 1939, ch. 1033, §§ 1-4, p. 2838; see *Bus. & Prof. Code*, §§ 25236-25238.) Second, by 1942, a regulation had been adopted imposing a similar 100 percent grape origin requirement for any wine labeled as

⁴⁸ "Composition" refers to the ingredients used to make a wine (27 C.F.R. § 4.34) and generally consists simply of grapes. "Method of manufacture" refers to approved wine treatment materials and processes. (27 C.F.R. § 24.175 *et seq.*) "Designation of wines" is a concept distinct from brand name or appellation; it refers to the class or type of wine rather than the source or origin of the wine. (27 C.F.R. §§ 4.32(a)(2), 4.34.) For example, a wine may be designated by class as a grape wine, sparkling grape wine, or carbonated grape wine (27 C.F.R. § 4.21), or by the grape varietal. (27 C.F.R. §§ 4.23, 4.24, 4.28.)

As Bronco concedes, California long has enforced regulations that differ from the federal regulations with respect to method of manufacture. (See, e.g., *Cal. Code Regs.*, tit. 17, §§ 17005 [providing, concerning "cellar treatment," that "[i]n case of conflict between Federal and State laws or regulations the California law or regulation shall take precedence"], 17010 [adopting regulations more restrictive than those contained in federal regulations concerning the use of sugar in the production or cellar treatment of wine].) Bronco contrasts what it asserts are these and similar permissible and specifically sanctioned departures from federal regulations with what it contends are impermissible deviations from federal labeling standards—especially federal regulations concerning the use of brand names on labels.

"'California' or any geographical subdivision thereof." (See Cal. Dept. of Pub. Health, Regs. Establishing Stds. of Identity, Quality, Purity and Sanitation and Governing the Labeling and Advertising of Wine in Calif. (May 23, 1942) art. I, § 2(aa)⁴⁹ (hereafter 1942 Regulations), presently *Cal. Code Regs.*, tit. 17, § 17015, subd. (a)(1).) Third, by 1942, a California regulation barred the "sale" of wines labeled with so-called coined (or semi-generic) brand names if the "brand designation resembles an established wine type name such as ... Madeira, ... Port, ... Claret, [or] Burgundy, etc." (See 1942 Regs., art. II, § 8.) Under this and subsequent versions of the same regulation, a label such as "Burgundy brand" was long barred in California.⁵⁰

The first two California labeling rules described above plainly imposed (and still impose) a more stringent standard than the 75 percent requirement set forth in the federal appellation-of-origin regulation. (Regs. No. 4, § 25, as revised, 3 *Fed. Reg.* 2093, 2096 (Aug. 26, 1938), presently 27

⁴⁹ This requirement may have gone into effect earlier than 1942. A predecessor to the regulations of 1942 had been adopted in April 1940. (See 1942 Regs., cover page ["These regulations supersede the Definitions and Standards--Wines, adopted December 1934, as amended, and Rules Governing California Vintage Wines, adopted April 6, 1940"].) The December 1934 regulations, as amended through January 18, 1936, have been described *ante*, part II.B.1.d. Despite the efforts of librarians throughout the state, we have been unable to locate the intervening regulations--if indeed there were any--or the 1940 "Rules Governing California Vintage Wines."

Article III, section 12(1) of the 1942 Regulations also provided, consistently with many of the prior statutes and regulations described earlier, that wine labels "shall not contain (1) *any statement, design, device or representation which is false or misleading in any material particular.*" (Italics added.)

⁵⁰ That California regulation, as adopted in the early 1940s, was in force until the mid-1980s. (See former Cal. Admin. Code, tit. 17, §§ 17001(a) & 17075(c)(2) (1978).) Oregon as well had a similar "coined" brand-name provision until the mid-1980s. (See Or. Admin. R. 845-10-285(3)(a) (1978).)

C.F.R. § 4.25(b)(1)(i).) The third provision described above prohibited name types that the federal regulations have permitted since 1941 upon a proper showing. (See 27 *C.F.R. § 4.33(b)*, as revised, 6 *Fed.Reg.* 2874 (June 13, 1941) [disallowing such a geographic name *unless* a federal officer finds the name, either qualified by word "brand" or otherwise, "conveys no erroneous impressions as to the ... origin ... of the product"].)

Although the parties dispute whether the first two state rules cited above are sanctioned by Code of Federal Regulations *section 4.25(b)(1)(iii)*--the federal provision that expressly authorizes state regulation concerning the "composition" (the grape ingredients) or "designation" of wine (the class or type of wine, as distinct from its source or origin)--the third California regulation, the "coined" brand-name provision, cannot be so distinguished. That state regulation plainly controlled, more strictly than the federal rules, not the mere composition or designation of wines, but the brand-name labeling of wines.

In any event, there is no indication that any question previously has arisen concerning the authority or enforceability of the California statute⁵¹ or of either regulation. Indeed, since mid-1939, the California Legislature has authorized state wine regulations that are stricter than federal wine regulations,⁵² and for nearly the past

⁵¹ The appellation "California Central Coast counties" has since fallen into disuse. (See *Regulation of American Wine Labeling*, *supra*, 11 U.C. Davis L. Rev. at p. 143.)

⁵² See Statutes 1939, chapter 60 (establishing the Health & Safety Code), page 992 (enacting former § 26541, requiring that certain state food and distilled spirits regulations not impose a standard higher than certain federal regulations--but *not* requiring such conformity with regard to state wine regulations); Statutes 1941, chapter 1042, section 3, page 2698 (enacting former § 26540.2, authorizing the State Board of Health to promulgate wine regulations), and section 4, page 2699 (amending § 26541 to specify that the section's general prohibition on imposition of higher state standards concerning food and distilled spirits "*shall not apply*

35 years, the Legislature expressly has authorized state wine regulations to "*differ from or be inconsistent with*" federal wine regulations (*Health & Saf. Code*, § 110525, italics added);⁵³ yet there is no indication the federal government has taken issue with this long-standing assertion of broad state authority.⁵⁴

The history of the early post-Prohibition-repeal California and federal wine labeling regulations reveals no evidence of any clear or manifest intent on the part of Congress, or the

to wine"). (Italics added.) Former section 26541's exemption of state wine regulations from the general rule against imposition of higher state standards relating to other foods and distilled spirits continued through various amendments of that former section, until that exemption ultimately was recast in 1970 as a positive right of state regulators to "differ from or be inconsistent with" corresponding federal wine regulations. (Stats. 1970, ch. 1573, § 5, p. 3255; see *post*, fn. 53 [quoting current *Health & Saf. Code*, § 110525]; cf. 44 *Ops. Cal. Atty. Gen.* 122, 125 (1964) [discussing similar history of *Health & Saf. Code*, former § 26542].)

⁵³ In 1970, Health and Safety Code former section 26515 was amended to specify: "Standards of identity and quality for wine adopted pursuant to this section *may differ from or be inconsistent with* the standards promulgated by [the federal regulators in the Department of the Treasury]." (Stats. 1970, ch. 1573, § 5, p. 3255, italics added.) The statute today provides the same. (*Health & Saf. Code*, § 110525 ["Standards of identity and quality for wine adopted pursuant to this section may differ from or be inconsistent with the standards promulgated by the Secretary of the Treasury pursuant to the *Federal Alcohol Administration Act*"].)

⁵⁴ Indeed, other jurisdictions, since 1976, expressly have recognized and incorporated California's more stringent "100 percent rule" into their own state wine regulations (see 16 *Tex. Admin. Code*, § 45.45(b) & (c) (eff. Jan. 1976) ["all grape wine bearing labels showing 'California' as the origin of such wine shall be derived 100 % from grapes grown and wine from such grapes fermented within the State of California"]; Wash. *Admin. Code*, § 314-24-003(5) [same]), and the federal regulating body itself has recognized California's "100 percent rule" as a valid exercise of state regulatory power. (See 58 *Fed. Reg.* 65295, 65297 (Dec. 14, 1993) [acknowledging "California's authority to enforce its own labeling requirements within the area of its jurisdiction"].)

regulatory agency charged with executing the relevant law, to preempt state wine labeling regulation such as *section 25241*. This *history* suggests, instead, the opposite.

b. Modification of federal regulations in the 1970s and 1980s, and adoption by Oregon of its more stringent wine labeling regulations

Beginning in the mid-1970s, the BATF, which in 1972 had been delegated the task of creating and enforcing federal regulations (see *ante*, fn. 43), began to consider proposals to further define and regulate appellations of origin. In connection with that inquiry, the BATF also began to consider how better to regulate the use in brand names of terms of "geographic or viticultural significance." (42 *Fed.Reg.* 30517, 30518 (June 15, 1977).)⁵⁵ In 1978 the BATF adopted, but then postponed enforcement of, new brand-name rules,⁵⁶ and it also adopted new regulations

⁵⁵ Under the then existing federal regulations, use of geographic brand names was permitted if (i) the word "brand" appeared after the brand name (27 *C.F.R.* § 4.33(b) (1976)) or (ii) at least 75 percent of the grapes originated in the appellation suggested by the brand name (*id.*, § 4.25 (1976)).

⁵⁶ Although the BATF in 1978 adopted new rules regulating the use in brand names of terms of geographic or viticultural significance, it delayed implementation of those rules, first until 1983 and ultimately until 1986. (43 *Fed.Reg.* 37672, 37674, 37678 (Aug. 23, 1978).) The brand-name rules that were adopted in 1978 (but that never became effective) would have provided: "A brand name of viticultural significance may not be used unless the bottling winery is located within the geographical area used in the brand name, and the wine meets the appellation of origin requirements for the area named" (meaning at least 75 percent of the grapes used to make the wine must be from that area). (43 *Fed.Reg.* 37672, 37678 (Aug. 23, 1978).) Alternatively, the 1978 regulation, as initially adopted, would have permitted use of a brand name of viticultural significance if "the brand name is qualified by the word 'brand' immediately following the brand name in the same size of type and as conspicuous as the brand name itself." (*Ibid.*)

As noted, implementation of the brand-name aspects of the rules repeatedly was delayed. (See 48 *Fed.Reg.* 2762 (Jan. 21, 1983); 50

concerning appellations of origin-- including a new subcategory within appellations of origin known as "viticultural areas." (43 *Fed.Reg.* 37672, 37674, 37678 (Aug. 23, 1978).)⁵⁷ The 1978 federal appellations of origin regulation expressly recognized the enforceability of state laws in relation to placing a "viticultural area" designation on a wine label, making the right to so label a wine contingent on compliance with, among other things, "*the laws and regulations of all of the States contained in the viticultural area.*" (27 C.F.R. former § 4.25a(e)(3)(iv) (1978-1981); *id.*, former § 4.25a(e)(3)(v) (1981-1986), italics added.)⁵⁸

Prior to and during this same period of federal regulatory action and consideration of geographic brand-name regulations (see *ante*, fn. 56), in 1977 the State of Oregon departed from the federal labeling regulations in substantial ways, imposing more stringent state rules concerning matters

Fed.Reg. 758 (Jan. 7, 1985).) Meanwhile, in 1984 the BATF retreated from its 1978 proposal concerning the use of brand names and proposed instead to address the issue by adopting either that plan, or one of three alternative plans. (49 *Fed.Reg.* 19330, 19331-19332 (May 7, 1984); see *post*, fn. 70 [describing the BATF's 1984 comments concerning proposed branding rules].) As explained below, based upon further review and the comments concerning its 1984 proposal, the BATF ultimately adopted, effective July 7, 1986, the regulation at issue in the present case. (51 *Fed.Reg.* 20480 (June 5, 1986).)

⁵⁷ An "appellation of origin" was, and continues to be, defined as a political division or subdivision—for example, a state, or group of states, or a county, or group of counties—in which grapes used to make a wine are grown. (See 27 C.F.R. § 4.25(a)(1)(i)-(vi).) A "viticultural area," by contrast, is a special subcategory within an appellation of origin (see 27 C.F.R. § 4.25(a)(1)(vi)) demarked not by political boundaries, but by geographic terms and characteristics.

⁵⁸ The other requirements for "viticultural area appellation" labeling were (and remain) (i) that the area be recognized under part 9 of 27 Code of Federal Regulations; (ii) that the wine be made from at least 85 percent grapes grown in that viticultural area; and (iii) that the wine be fully "finished" within the state (or one of the states) of the viticultural area. (27 C.F.R. § 4.25(e)(3)(i), (ii) & (iv).)

such as percentage content of Oregon appellation wines,⁵⁹ use of "semi-generic" place names,⁶⁰ percentage content of varietal wines,⁶¹ use of the term "estate bottled,"⁶² and the use

⁵⁹ An administrative regulation of the Oregon Liquor Control Commission (former Or. Admin. R. 845-10-292(6)(c), eff. Mar. 1, 1977, currently Or. Admin. R. 845-010-0920(1) & (2) (2004)), requires: "(1) An appellation of origin must appear on every wine brand label in direct conjunction with, and in lettering as conspicuous as, the wine's class or type designation. The lettering must be at least two millimeters in height. (2) No person may sell or offer to sell a wine, claiming or implying a certain appellation of origin anywhere on its label, unless 100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin. . . ." The corresponding federal regulations, by contrast, impose only a 75 percent rule for appellations of origin (27 C.F.R. § 4.25(b)(1)(i)), an 85 percent rule for American viticultural areas (27 C.F.R. § 4.25(e)(3)(ii)), and a 95 percent rule for individual vineyard appellations (27 C.F.R. § 4.39(m)).

⁶⁰ Compare Oregon Administrative Rule 845-10-292(5), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0930 (2004) (barring use of "semi-generic" place names [such as Burgundy, Chablis, and Chianti] on Oregon wine labels) with Regulations 27 *Code of Federal* section 4.24(b)(2) (permitting those same names on federally approved labels).

⁶¹ Compare Oregon Administrative Rule 845-10-292(3)(a), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0915(1) (2004) (a varietal name [such as Chardonnay or Pinot Noir] may not be used on an Oregon wine label unless at least 90 percent of the wine's grapes are of that varietal) with 27 *Code of Federal Regulations* section 4.23(b) (permitting use of a varietal name on federally approved labels if only 75 percent of the wine's grapes are of that varietal).

⁶² Compare Oregon Administrative Rule 845-10-292(4)(c), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0925 (2004) (barring use of the term "estate bottled" on Oregon wine labels unless, among other things, the wine's grapes were grown within five miles of the winery) with 27 *Code of Federal Regulations* section 4.26 (permitting the term "estate bottled" on federally approved labels without requiring that the wine's grapes have been grown within five miles of the winery).

of geographic brand names.⁶³ In each of these respects, Oregon reserved the right to *disapprove* wine labels that had been granted a valid federal certificate of label approval.⁶⁴

For present purposes, the most relevant of these various departures from federal wine labeling regulations concerns Oregon's geographic brand-name rule.

Effective March 1, 1977, Oregon Administrative Rule 845-10-292(6)(e) provided that appellation names--including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley--"*shall not be used in a brand name, in the name of a winery or in any other manner on a label unless 100 percent of the grapes used to produce the wine were grown within the boundaries of that appellation of origin.*" (Italics added.) The regulation included a grandfather clause permitting "use by a winery of a brand name which has been in use *by that winery* on its approved labels prior to *January 1, 1977.*" (Or. Admin. R. 845-10-292(6)(e) (1977), italics added.)⁶⁵ Like the other Oregon labeling rules that specifically exceed the federal regulations, this Oregon

⁶³ See Oregon Administrative Rule 845-10-292(6)(e), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0920(4)(f) (2004), discussed in the text, *post*.

⁶⁴ See Oregon Administrative Rule 845-10-290(2) (1977), currently Oregon Administrative Rule 845-010-0290(2) (2004) (providing that each wine label must (i) receive a federal COLA *and* (ii) comply with the more stringent Oregon rules concerning percentage contents for appellations of origin, semi-generic names, grape content of varietal wines, brand names, and use of the term "estate bottled").

⁶⁵ We note the narrowness of this grandfather provision compared with the federal grandfather clause that we consider in the present case. In addition to the earlier cutoff date (1977 under the state regulation, as compared with 1986 under the federal regulation), the phrasing of the provision suggests that the right of grandfathered use may not be transferred to another entity, as was done in the present case. (Cf. Comment, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels* (2001) 89 Cal. L. Rev. 1881, 1912-1913.)

geographic brand regulation remains in force today, more than a quarter-century after its adoption. (See Or. Admin. R. 845-010-0920(4)(f) (2004)).⁶⁶

We find these Oregon regulations relevant to our current inquiry in three interrelated respects.⁶⁷ First, the state

⁶⁶ As most recently amended, the regulation provides that appellation names--again including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley or "words that may be mistaken for an approved appellation of origin in a brand name [or] in a winery name, or in any other manner on a wine label" may not be used "unless the wine meets the requirements for use of that appellation of origin" (Or. Admin. R. 845-010-0920(4)(f) (2004)), that is, "100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin." (*Id.*, 845-010-0920(2) (2004).) Like the original version of the regulation, the provision also retains a restrictive grandfather clause: "A winery may continue to use any brand name that *it has used* on its approved label since before *January 1, 1977*." (*Id.*, 845-010-0920(4)(f) (2004), italics added.)

⁶⁷ We reject Bronco's preliminary argument, raised in its supplemental briefs, that Oregon Administrative Rule 845-010-0280 implicitly nullifies Oregon wine regulations discussed above, such as the estate-bottled provision and the geographic brand-name provision.

The cited rule addresses "Standards of Identity and Prohibited Practices Concerning Wine" and provides that Oregon regulations concerning those two topics, set forth in Oregon Administrative Rule "845-010-0905 [definitions] and 845-010-0940 [use of water, wine spirits and other sweetening agents]," shall prevail over any less stringent or restrictive federal law. (Or. Admin. R. 845-010-0280 (2004), italics added.) As Bronco observes, in an introductory sentence the regulation *also* states: "The Commission adopts, by reference, 27 CFR [parts] 4 [the federal wine labeling regulations] and 24[] [wineries and wine-making regulations] (1986). These regulations of the Bureau of Alcohol, Tobacco [] and Firearms of the United States Department of Treasury apply to all wine sold in Oregon by a Commission licensee." (*Ibid.*)

Bronco reads this language as adopting generally the federal regulations concerning, for example, the use of the term "estate bottled" and geographic brand names for all Oregon wines sold in that state--and hence as implicitly repealing or at least superseding those Oregon rules insofar as in-state sales of Oregon wines are concerned. Bronco's interpretation of the Oregon rules is belied by Oregon Administrative Rule 845-010-

regulations-- especially the strict geographic brand-name rule, and the estate-bottled rule--demonstrate that Oregon has long imposed labeling rules that are both (i) more stringent than the federal rules *and* (ii) go far beyond 27 *Code of Federal Regulations* section 4.25(b)(1)(iii)'s authorization for states to regulate the "composition, method of manufacture, [or] designation of wines"

Second, it is clear that the BATF has long been aware of these stricter Oregon rules and apparently views them as enforceable. The Oregon regulations had been in place for approximately 16 months at the time the BATF adopted its 1978 regulation concerning the use of "viticultural area" appellations on wine labels. That 1978 BATF regulation, as noted above, *expressly acknowledged and required compliance with "the laws and regulations of all the States contained in the viticultural area."* (27 C.F.R. former § 4.25a(e)(3)(iv) (1978-1981); *id.*, former § 4.25a(e)(3)(v) (1981-1986), *italics added.*) By so providing, the BATF, as of 1978, acknowledged the propriety and enforceability of the more stringent labeling rules promulgated by the states.

Indeed, any doubt in this regard is dispelled by the BATF's action and comments seven years later (in late January 1986) when, in the course of repealing as a *federal* requirement 27 Code of Federal Regulations former section 4.25a(e)(3)(v)'s rule concerning compliance with state regulations relating to viticultural areas, the BATF expressly and repeatedly acknowledged both the existence and the *enforceability* of Oregon's "more stringent" wine labeling regulations.⁶⁸ The BATF explained that although it had

0910(2) (2004), which plainly states that Oregon Administrative Rules "845-010-0905 through 845-010-0940 [i.e., including Oregon's estate-bottled and geographic brand-name provisions] apply to all grape wines produced or bottled in Oregon . . ."—that is, regardless where such wines are sold—and that "[t]hese rules prevail in any conflict between . . . other rules in Chapter 845, Division 010." (*Italics added.*)

⁶⁸ As the BATF explained, prior to adoption of its 1978 appellation rules,

decided, with regard to viticultural areas, to eliminate compliance with state laws *as a federal requirement*, the underlying substantive state law requirements relating to viticultural areas would remain, to be enforced solely by the respective states. The BATF observed: "*State laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing*

appellations of origin relating to American wines generally were characterized as regions or places delimited by political boundaries, such as states or counties. As observed *ante*, at footnote 57, the 1978 appellation rules expanded the concept of appellations of origin by additionally including under that term "viticultural areas"--that is, grape growing regions--defined by geographic features, and not political lines. Because some of these viticultural areas straddled states, a problem eventually arose concerning the federal requirement, then set out in 27 Code of Federal Regulations former section 4.25a(e)(3)(v) (1981-1986), that in order to employ a viticultural area designation, a winery must "conform[] to the laws and regulations of all the States contained in the viticultural area." Specifically, the BATF noted (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986)), if a wine were to use the viticultural area designation "Columbia Valley" (a federally recognized viticultural area straddling Oregon and Washington), the winery producing the wine would be required to comply with Oregon's state regulations, even if the grapes were grown in the Washington part of the Columbia Valley and the wine was made and finished only in Washington. Moreover, the BATF observed, "regulations of Oregon and Washington differ greatly regarding the production and labeling of wine. Oregon regulations are more stringent than Federal regulations." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), *italics added*.) The BATF observed that because former section "4.25a(e)(3)(v) required compliance with laws and regulations of all states within a multistate viticultural area, regardless of where the wine is fermented or finished, wine made from grapes originating and fermented in Washington, and finished and bottled within Washington was, nevertheless, subjected to Oregon law and regulations if the wine claimed a multistate viticultural area appellation such as Columbia Valley." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986).) And yet, the BATF determined, "[a] Federal requirement for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce due to the multitude of state and local laws and regulations." (*Ibid.*, *italics added*.) Accordingly, the BATF concluded, it did not "believe that Federal regulation should impose the State laws or regulations of one state upon transactions occurring in other states." (*Ibid.*)

winery. *These state laws and regulations are enforced by the state involved.*" (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), *italics added.*)⁶⁹

Third and finally, the Oregon geographic brand-name regulation, in particular, sheds light upon the BATF's apparent understanding of the grandfather clause at issue in this case. Almost 10 years after Oregon adopted its restrictive geographic brand-name labeling regulation, the BATF, after considering various options over the preceding decade (see *ante*, fn. 56, and *post*, fn. 70), amended 27 *Code of Federal Regulations* section 4.39(i)(1) in the manner at issue in this case, to prohibit the use of labels with brand names implying that a wine was made with grapes grown in the area suggested by the brand name, unless at least 75 percent of the grapes used to make the wine were in fact from that area. But, as noted above, the new federal regulation also contained a grandfather clause that lies at the center of the controversy in this case, under which such otherwise misleading labels are not prohibited, so long as the label was in use prior to July 1986 and the label discloses the true appellation of origin of at least 75 percent of the grapes actually used to make the wine inside the bottle. (*Id.*, § 4.39(i)(2)(ii).)⁷⁰

⁶⁹ Underscoring this point, the BATF observed in the summary of its decision that although "the requirement to comply with State laws and regulations is removed as a Federal requirement," still, "[t]he State laws and regulations remain in effect and will continue to be enforced by the agencies of the states involved in winemaking." (51 Fed.Reg. 3773 (Jan. 30, 1986), *italics added.*)

⁷⁰ See 27 *Code of Federal Regulations* section 4.39(i), quoted in full *ante*, at footnote 7. As Bronco observes, in a notice of proposed rulemaking issued in 1984—two years prior to the BATF's adoption of the present brand-name provision and its grandfather clause—the BATF stated that it did not wish to adopt a regulation that "may be too restrictive." (49 Fed.Reg. 19330, 19331 (May 7, 1984).) After outlining four possible regulatory responses to the brand-name problem, the BATF stated, in reference to a possible rule strictly regulating the use of terms of viticultural significance in brand names, its "belie[f that] the wine industry should be allowed flexibility in selecting brand names under which to

In view of the BATF's explicit acknowledgement, only four months prior to its adoption of the provision at issue in the present case, that the Oregon labeling regulations are proper and enforceable (see *51 Fed.Reg.* 3773, 3774 (Jan. 30, 1986)), it is reasonable to assume that the BATF, when it adopted the grandfather clause, was aware of Oregon's "more stringent" geographic brand-name labeling rule. And yet the BATF said nothing in its new provision or in its discussion of that new rule to suggest that the new rule preempted Oregon's long-standing, closely related, and more stringent brand-name labeling rule.

Accordingly, contrary to Bronco's theory that the BATF itself viewed or views its wine labeling regulations as preempting more stringent state regulations, we conclude that the history of the federal and Oregon wine labeling regulations in the mid-1970s through the present reveals no evidence of any such intent. Instead, that history strongly indicates that the BATF has long contemplated that the states will enforce their own stricter labeling requirements, and that the agency did not and does not view its labeling regulations as preempting more stringent state regulations such as *section 25241*.

c. Amendment of the FAA Act in 1988, and corresponding regulations, requiring health warning labels and expressly preempting state regulation of such labels

market their products *without having a whole class of brand names become totally unusable.*" (*Id.* at pp. 19331-19332, italics added.) As explained *post*, part II.D.1, Bronco suggests that this language supports a conclusion that two years later, when the BATF adopted 27 *Code of Federal Regulations* section 4.39(i)(2)(ii) and concluded that the new rule "will provide the industry with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names" (*51 Fed.Reg.* 20480, 20482 (June 5, 1986)), the BATF, in so acting, engaged in a "careful balancing of federal policy objectives" and intended to *allow* the kind of brand-name labeling here at issue.

In 1988, Congress amended the FAA Act to require that all wine labels (and the labels of other alcoholic beverages) contain a warning on the back label, as follows: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." (27 U.S.C. § 215(a).) Congress gave the BATF authority to issue appropriate regulations to enforce Congress's will (*id.*, § 215(b) & (d)), and, stressing the perceived need in this particular area for Congress to "exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program" (27 U.S.C. § 213), further provided expressly for federal preemption of such health warnings on alcoholic beverage labels: "No statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage" (*Id.*, § 216.) The BATF responded by adopting implementing regulations (see 27 C.F.R. § 16.20 *et seq.*) as well as a provision expressly reaffirming the preemptive effect of that regulation. (*Id.*, § 16.32.)

As the United States Supreme Court has observed, "'an express definition of the pre-emptive reach of a statute ... supports a reasonable inference ... that Congress did not intend to pre-empt other matters.'" (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 [150 L. Ed. 2d 532, 121 S. Ct. 2404], quoting *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288 [131 L. Ed. 2d 385, 115 S. Ct. 1483]; accord, *Bass River Associates v. Mayor, Tp. Com'r* (3d Cir. 1984) 743 F.2d 159, 162 ["It is of some interest and no small significance that a provision in the same title does provide for federal preemption of state and local laws or regulations"].)

This inference and these observations are especially apt here, in light of the history described above, which strongly suggests (i) no intent on the part of Congress, in 1935 or thereafter, to preempt any *other* category of state wine label laws and (ii) the BATF's acknowledgement of, and apparent acquiescence in, the more stringent wine labeling laws of the states, and specifically those of Oregon. Indeed if Congress, as Bronco asserts, by enactment of the FAA Act in 1935, already had generally preempted state regulation of wine labels, there would have been no need for any express preemption clause or preemption regulation with respect to the 1988 health warnings for wine labels.

Once again, this history reveals no evidence of any clear or manifest intent on the part of Congress or the BATF to preempt state wine labeling regulation such as *section 25241*. Instead, the history supports an opposite inference that neither Congress nor the BATF intended to preempt state wine labeling laws such as *section 25241*.

D.

Having concluded that Bronco has failed to carry its burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the BATF, to preempt the traditional exercise of state police power such as the wine labeling regulation found in *section 25241*, we proceed under the presumption that no such preemption was intended. We bear this presumption in mind when we consider below Bronco's assertion that *section 25241*, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.

1. *Does section 25241, by prohibiting, with respect to Napa County, what the federal grandfather clause does not prohibit, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?*

In support of its assertion that *section 25241* frustrates the full purposes and objectives of federal law, Bronco cites various cases in which courts have made such (or similar) findings in other contexts. (*Geier, supra*, 529 U.S. 861, 881 [state tort action based upon failure to equip automobile with airbags would frustrate federal highway safety standards permitting car makers to employ passive restraint devices other than airbags]; *Barnett Bank, supra*, 517 U.S. 25, 31 [state statute barring national bank from selling insurance would obstruct federal statute that permitted, but did not require, national banks to sell insurance]; *Lawrence County, supra*, 469 U.S. 256, 260-268 [state law requiring certain method of distribution of federal funds held to obstruct federal statute that was designed to provide local governments freedom to spend those federal funds "as they saw fit"]; *McDermott v. Wisconsin* (1913) 228 U.S. 115, 129 [57 L. Ed. 754, 33 S. Ct. 431] [state statute that required removal of certain labels on syrup was preempted by federal statute under which such labels had been approved]; *Dowhal, supra*, 32 Cal.4th 910, 929, 935 [state law warnings concerning nicotine frustrated the purposes of the federal *Food, Drug & Cosmetic Act*].)

The Department and the NVVA, by contrast, distinguish each of these cases and rely instead primarily upon *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 68-70 [154 L. Ed. 2d 466, 123 S. Ct. 518], in which the high court declined to find preemption of a state tort action seeking to impose standards for boat propeller guards, even in the face of a decision by federal authorities not to impose any general or universal propeller guard requirements. See also, e.g., *California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 582-584 [94 L. Ed. 2d 577, 107 S. Ct. 1419] (*Granite Rock Co.*) [federal approval of mining project was not frustrated by California's stricter environmental requirements; indeed, the federal regulations assumed the applicability of the state regulations]; *Hillsborough County v. Automated Medical*

Labs. (1985) 471 U.S. 707, 720-721 [85 L. Ed. 2d 714, 105 S. Ct. 2371] (*Hillsborough County*) [stricter local regulations concerning plasma donors posed no serious obstacle to related federal regulations]; cf. *Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 132 [57 L. Ed. 2d 91, 98 S. Ct. 2207] (*Exxon*) [no preemption of state discriminatory pricing regulations barring conduct that triggered a limited defense under federal law].)

Bronco asserts that *section 25241* frustrates the purposes of Congress, or at least of the BATF's regulation establishing a grandfather clause (§ C.F.R. 4.39(i)(2)(ii)), in "four interrelated ways." Bronco argues: (i) *Section 25241* prohibits precisely what the regulation establishing the grandfather clause "expressly and unambiguously authorizes"; (ii) the regulation establishing the grandfather clause "embodies a specific determination by federal regulators that the use of established geographical brand names for wines from a variety of appellation areas would not be misleading if the labels also featured the true appellation of origin"; (iii) the regulation establishing the grandfather clause "reflects a careful balancing of federal policy objectives" and a determination by the BATF that the regulations should not render a "whole class" of established brand names "totally unusable" (see *ante*, fn. 70); and (iv) the BATF, in adopting its rule and regulation establishing a grandfather clause, expressly rejected as "too restrictive" a general rule that would have confined the use of established geographic brand names to wines made from the region referred to in the brand name.

In reply, the Department and the NVVA assert that *section 25241* is in aid of, and consistent with, Congress's general and overriding purpose in adopting United States Code *section 205(e)* in 1935--namely, the prevention of consumer deception relating to wine labeling. The Department and the NVVA claim that Bronco has failed to identify any congressional purpose with which *section 25241*

interferes. In this respect, the NVVA argues, "[t]he assertion that the grandfather clause represents a 'deliberate federal policy determination' or 'regulatory balance' assumes that Congress or [the] BATF identified some affirmative reason that the government of the United States wanted Bronco to be able to sell wine made from non-Napa grapes under labels saying 'Napa.'" The Department asserts there is no support for the proposition that federal regulators have concluded that in all cases, the presence of a true appellation of origin dispels the effects of misrepresentations reflected in a brand name.

Both the Department and the NVVA acknowledge that in 1984 the BATF, in discussing various options for addressing the problems posed by geographic brand names, asserted that it did not believe it appropriate to issue regulations that "may be too restrictive" or render "totally unusable" a "whole class" of brand-name labels. (See *ante*, fn. 70.) But, the Department and the NVAA argue, those statements suggest at most that the BATF did not believe it prudent to impose a *national*, or total, ban on the use of existing brand labels that suggested an origin of wine different from the actual origin of the grapes used in making the wine. The Department and the NVVA argue that the circumstance that the BATF did not see fit "totally" to eliminate a "whole class" of existing labels on a national basis without regard to the policies of a particular state does not provide evidence establishing that *section 25241* frustrates any significant federal purpose. In this respect, the NVVA asserts that when, as here, the objectives of the state legislature are identical to the overriding purpose of section 205(e) of the FAA Act (protecting consumers from misleading wine labels), "in the absence of preemptive intent, the fact that [the] BATF may have balanced federal policies and arrived at a particular result does not prevent California from considering its own local policies and needs and passing its own [more stringent] laws." Finally, the Department and the NVVA observe that the BATF apparently never contemplated, much less rejected, any area-specific

exemption from the federal grandfather clause, such as is found in *section 25241*'s special Napa County labeling rule. The NVVA concludes, "There is no evidence that [the] BATF considered the limited consumer protection provided by the grandfather clause to be sufficient to protect consumers in all cases, or intended to prevent states from preventing the kind of abuses which Bronco and other opportunistic winemakers could perpetuate under the grandfather clause."

In view of Bronco's repeated suggestions that we should be influenced in our assessment by the circumstance that the federal regulations at issue are part of a comprehensive scheme, in resolving these conflicting views concerning whether *section 25241* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress we bear in mind the high court's admonition in *Hillsborough County, supra*, 471 U.S. 707, 717: "We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our *Supremacy Clause* jurisprudence. See *Jones*[, *supra*], 430 U.S. [519] at 525. Moreover, *because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.*" (Italics added.)

In addition, we are guided by the high court's observation in *Crosby, supra*, 530 U.S. 363, 373, that what constitutes a "sufficient obstacle [for a finding of implied preemption] is a

matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." (Italics added.) The high court also has explained that our inquiry in this regard "requires us to consider the relationship between state and federal laws *as they are interpreted and applied, not merely as they are written.*" (Jones, *supra*, 430 U.S. 519, 526, italics added.)

We question Bronco's characterization of the state statute as prohibiting "precisely what [the regulation establishing the grandfather clause] *authorizes.*" (Italics added.) As the NVVA asserted at oral argument and as we observed in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 183 [83 Cal. Rptr. 2d 548, 973 P.2d 527], "[t]here is a difference between (1) not making an activity unlawful, and (2) making that activity lawful." In our view it is more accurate to characterize the state statute as prohibiting--with respect to Napa County--what the federal regulation's grandfather clause *does not prohibit.*

In any event, Bronco's repeated emphasis upon an alleged federal "authorization" presents a myopic and oversimplified analysis. The crucial question is, instead, whether the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Turning to *that* question, we agree with the Department and the NVVA that *section 25241* is consistent with Congress's overall purpose in enacting 27 *United States Code section 205(e)*--that is, to "insure that the purchaser should get what he thought he was getting, [and] that the representations both on labels and in advertising should be honest and straightforward and truthful." (Hearings before House Com. on Ways and Means on H.R. No. 8539 [Fed. Alcohol Control Act] (1935), testimony of Joseph H. Choate, former Chairman of the FAC Admin., 74th Cong., 1st Sess., at p. 10; H.R. Rep. No. 1542, 74th Cong., 1st Sess., p. 3 (1935) [highlighting deceptive labeling practices]; 79 Cong. Rec. (1935) 11714

[same].) The state statute also is consistent with the recognition that the *FAA Act* was necessary in order to "do something to supplement legislation by the States to carry out their own policies" because the states "alone cannot do the whole job." (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714.) For the reasons set forth above by the Department and the NVVA, we find that *section 25241* does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In reaching this determination, we also are persuaded by the apparent congressional and regulatory acquiescence in California's long-standing regulations applicable to the labeling of wines produced in California. This acquiescence militates against concluding that California's *section 25241*, enacted in 2000, constitutes a "sufficient obstacle" supporting a finding of implied preemption based upon a theory of frustration of federal purpose. Indeed, any doubt that we may have had in this regard is dispelled by the related history of Oregon's corresponding geographic brand-name labeling regulation, which, as explained above, since 1977 has imposed a rule far stricter than the federal rule that existed in the mid-1970s and, like the California statute now under review, also established a regulation far more stringent than that set forth, effective in 1986, under the federal grandfather clause. In other words, like the California statute, the Oregon brand-name regulation prohibits for certain Oregon names what the federal grandfather does not prohibit.

As explained above, the BATF long has been aware of these stricter state law brand-name labeling regulations, and, far from suggesting that their enforcement would frustrate any federal purpose,⁷¹ the BATF expressly has stated its understanding that such labeling regulation will be enforced

⁷¹ We note that the BATF has not been reluctant to commit its thoughts to public view through publication of proposed rules and related comments in the Federal Register.

by the states. In this setting, the BATF's failure to question the enforcement of these more stringent state regulations--while instead acknowledging generally the propriety of such regulations--suggests that the BATF, the expert body charged with the enforcement of 27 *United States Code* section 205(e), does not view these state regulations as being preempted by federal law, and also does not view them as posing an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See, e.g., *Hillsborough County, supra*, 471 U.S. 707, 721 [because "the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma"]; accord, *Granite Rock Co., supra*, 480 U.S. 572, 582-583 ["If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations"].)

We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general matter* its grandfather clause was appropriate so as to avoid destroying an "entire class" of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns. See *Olszewski, supra*, 30 Cal.4th 798, 815 [the presumption against preemption "'reinforces the appropriateness of a narrow reading of'" assertedly preempting language]; accord, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 518 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; *Medtronic, supra*, 518 U.S. 470, 485; cf. *Exxon, supra*, 437 U.S. 117, 132 ["it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion"].) or the reasons set forth

above, we conclude that the state labeling rule in question does not frustrate Congress's intent or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁷²

2. Does section 25241, by imposing additional conditions not required for the issuance of a federal COLA, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?

Bronco also asserts that section 25241 is impliedly preempted because, it is claimed, the statute imposes additional conditions not required by federal COLAs and thereby nullifies an asserted "right" or federal "license" to market wine in interstate and foreign commerce. In support, Bronco relies upon numerous cases holding, on the facts presented, that a state may not, by its own regulations, impair rights granted under a federal license or permit. E.g., *Gibbons v. Ogden* (1824) 22 U.S. 1 [6 L. Ed. 23] [federal steamboat license preempted New York statute barring passage between New Jersey and New York]; *Ray, supra*, 435 U.S. 151, 164-165 [federal permit authorizing a vessel to carry cargo in United States waters prevails over the contrary state judgment]; *Sperry v. Florida* (1963) 373 U.S. 379, 385 [10 L. Ed. 2d 428, 83 S. Ct. 1322, 1963 Dec. Comm'r Pat. 211] [state statute barring unauthorized practice of law could not be applied to nonlawyers licensed under federal law to prosecute patents]; *Leslie Miller, Inc. v. Arkansas* (1956) 352 U.S. 187, 188-190 [1 L. Ed. 2d 231, 77 S. Ct. 257] [state licensing law could not be applied so as to effectively allow

⁷² For similar reasons, we find unpersuasive the related arguments of amici curiae on behalf of Bronco, that section 25241 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because the statute assertedly (i) "impairs the long-standing national policy favoring uniform and consistent federal wine labeling regulations," (ii) "impairs the consistent federal policy permitting continued use of established brands," and (iii) "will frustrate the United States' ability to protect established brands and trademarks in ongoing trade negotiations."

state to declare "irresponsible" a contractor certified by the federal government as "responsible"]; *Castle v. Hayes Freight Lines, Inc.* (1954) 348 U.S. 61, 64 [99 L. Ed. 68, 75 S. Ct. 191] [state could not bar federally licensed truck driver from its roads for repeated violations of state traffic laws]; *First Iowa Coop. v. Power Comm'n* (1946) 328 U.S. 152, 164-167 [90 L. Ed. 1143, 66 S. Ct. 906] [federal permit issued for interstate utility project precluded state attempt to proscribe project].)

The Department and the NVVA, asserting that these cases are distinguishable, rely upon other high court cases holding that, in certain circumstances, possession of a federal license does not confer immunity "from the operation of the normal incidents of local police power." (*Huron Cement Co. v. Detroit* (1960) 362 U.S. 440, 447 [4 L. Ed. 2d 852, 80 S. Ct. 813] [upholding enforcement of city's smoke abatement ordinance against federally licensed vessels]; see also *Florida Avocado, supra*, 373 U.S. 132, 141 [upholding California's right to enforce regulations prohibiting the sale of certain federally approved Florida avocados]; *Medtronic, supra*, 518 U.S. 470, 492-494 [federal approval of medical device did not preempt state action claiming the approved device was defectively designed]; *Granite Rock Co., supra*, 480 U.S. 572, 582-583 [federal approval of mining project did not preempt California's stricter environmental requirements]; *Pacific Gas & Elec. v. Energy Resources Comm'n* (1983) 461 U.S. 190, 222-223 [75 L. Ed. 2d 752, 103 S. Ct. 1713] [federal nuclear power plant license did not preempt stricter state licensing requirements].)

These licensing cases in essence present the same issue discussed above, namely, whether the state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. But as both the Department and the NVVA observe, it is quite doubtful that a federal COLA issued pursuant to 27 *United States Code* section 205(e) and the corresponding wine label certificate

regulations (27 C.F.R. § 4.50 *et seq.*) are equivalent to the licenses or permits at issue in the cases upon which Bronco relies, and Bronco does not provide any convincing authority suggesting that a COLA constitutes a license or permit as understood in those cases. Indeed, it is apparent from the *FAA Act* itself, and from the corresponding regulations, that both Congress and the BATF well understand the distinction between a license or permit, on one hand, and a COLA, on the other. Congress requires wine importers, producers, and wholesalers to secure a “basic permit” (27 U.S.C. § 203(a)-(c); see also *id.*, § 204 [setting forth permit procedures]), and the BATF has adopted extensive corresponding regulations concerning such permits (27 C.F.R. §§ 1.20-1.59). By contrast, nowhere in the separate COLA procedures set forth in 27 *United States Code* section 205(e), or the extensive COLA regulations (27 C.F.R. §§ 4.50-4.52, 13.1-13.92), does Congress or the BATF even *imply* that a COLA constitutes a license or permit. Quite the contrary.

As explained above, it is evident that the BATF envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements, and that BATF generally views its role as being confined to ensuring compliance with the bare terms of *federal* labeling law. (See, e.g., 51 *Fed.Reg.* 3773, 3774, discussed *ante*, at pt. II.C.2.b.) As the NVVA observes, the BATF itself has confirmed this view of its enforcement authority and of any resulting COLA that it issues by noting, on its COLA application form, that the BATF uses the form only for its own federal enforcement duties but that it may share the information supplied to *state regulators* “to aid in the performance of their duties.” (Dept. of Treas., Alcohol and Tobacco Tax Trade Bur., Application for and Certification/Exemption of Label/Bottle Approval, TTB F 5100.31 (4/2004), p. 3 <<http://www.ttb.gov/forms/5000.htm#alcohol>> [as of Aug. 5, 2004].)

Nor, contrary to the assertions of Bronco and suggestions by the Court of Appeal below, can a COLA properly be

viewed as conferring a "right" on the holder to market wines in interstate or foreign commerce so long as the bare BATF labeling regulations are satisfied. The BATF itself has observed that a "certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder" and that a certificate "'is issued for [B]ATF use only . . .'. The certificate of label approval is a statutorily mandated tool used to help the [B]ATF in its enforcement of the labeling requirements of the *FAA Act*." (64 *Fed.Reg.* 2122, 2123 (Jan. 13, 1999).) As the New Jersey Supreme Court observed in a related context, a COLA "goes no further than evidencing compliance with [federal regulatory] standards imposed only for the purposes mentioned in the valid exercise of federal authority." (*Boller Beverages, Inc. v. Davis* (1962) 38 *N.J.* 138 [183 *A.2d* 64, 69].)

III.

Bronco has failed to carry its burden of demonstrating federal preemption of a long-established and legitimate exercise of state police power with respect to the subject regulated by section 25241. As we have seen, there is no express preemption in the present context, and Bronco's assertions of implied preemption are contradicted by the long history we have described of concurrent state and federal regulation of wine labels including, historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine. Nor has Bronco succeeded in providing any persuasive indication that this long-standing concurrent regulatory scheme no longer is compatible with Congress's overall purposes which have been to support the states' efforts to protect consumers from misleading labeling, not to permit the type of labeling at issue here. Finally, Bronco has not established that, by purchasing a brand name that had been used prior to 1986, it acquired a federally recognized right or license exempting it from stricter state regulation.

California is recognized as a preeminent producer of wine, and the geographic source of its wines reflecting the attributes of distinctive locales, particularly the Napa Valley--forms a very significant basis upon which consumers worldwide evaluate expected quality when making a purchase. We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry.

For the reasons set forth above, we reverse the judgment of the Court of Appeal and remand the case to that court to enable it to address Bronco's remaining claims.

Kennard, J., Baxter, J., Chin J., Brown, J., Moreno, J., and Swager, J.P.T., concurred.

APPENDIX

APPENDIX B

29 Cal. Rptr. 3d 462

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

**BRONCO WINE COMPANY et al.,
Petitioners,**

v.

**JERRY R. JOLLY, as Director, etc., et al.,
Respondents;**

**NAPA VALLEY VINTNERS ASSOCIATION,
Intervenor.**

No. C037254.

May 26, 2005.

**OPINION ON REMAND
AS MODIFIED ON DENIAL OF REHEARING, JUNE 20,
2005
PETITION FOR REVIEW DENIED, AUGUST 24, 2005**

**ORIGINAL PROCEEDING: Application for Writ of
Mandate. Writ denied.**

**Howard, Rice, Nemerovski, Canady, Falk & Rabkin,
Jerome B. Falk, Jr., Steven L. Mayer; Ropes & Gray, Peter
M. Brody, for Petitioners.**

**Bill Lockyer, Attorney General, Miguel A. Neri, Fiel
Tigno, Supervising Deputy Attorneys General, Terry Senne,
Deputy Attorney General, for Respondents.**

**Dickenson, Peatman & Fogarty, Richard P.
Mendelson and Deborah E. Quick; Horvitz & Levy, Ellis J.
Horvitz; Kathleen M. Sullivan, for Intervenor.**

Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (collectively Bronco) filed a petition for writ of mandate, invoking our original jurisdiction. It seeks declaratory and injunctive relief barring application of the labeling requirements of Business and Professions Code section 25241 to wines produced by Bronco that are destined for interstate commerce because the section is in conflict with Bronco's federally approved certificates of label approval (COLA).¹

Bronco possesses COLAs for the brand names "Napa Ridge," "Rutherford Vintners," and "Napa Creek Winery," which authorize the distribution in interstate commerce of wine bearing these brand names if the true appellation of origin of the grapes used in making the wine appears on the label.²

Section 25241 prohibits the use of a brand name with the word "Napa," or any federally recognized viticultural region within Napa County, on the label, packaging material, or advertising of wine produced, bottled, labeled, offered for sale or sold in California, unless at least 75 percent of the grapes used to make the wine are from Napa County, or 85 percent of the grapes used to make the wine are from a viticultural region within Napa County. The statute applies to wine destined for both intrastate and interstate commerce.

We issued a judgment invalidating section 25241 as preempted by federal law because it was in conflict with Bronco's federally approved COLAs. The Supreme Court reversed the judgment and remanded the case for consideration of Bronco's remaining claims that section 25241 violates the free speech provisions of the state and

¹ All further section references are to the Business and Professions Code unless otherwise specified.

² An appellation of origin specifies the geographic area where the grapes used to produce the wine are grown. (*Bronco Wine, supra*, 33 Cal.4th at p. 951.)

federal constitutions and the commerce and takings clauses of the federal constitution. *Bronco Wine Company v. Jolly* (2004) 33 Cal.4th 943 (hereafter *Bronco Wine*).

We shall deny Bronco's free speech claims on the ground section 25241 is a valid regulation of inherently misleading commercial speech.

We shall deny Bronco's claim the commerce clause invalidates section 25241 on two allied grounds. First, as construed by *Bronco Wine, supra*, the federal law authorizes or contemplates that California may establish stricter wine labeling requirements for wine destined for interstate distribution. Second, the state's interests in protecting California wine consumers from misleading brand names of viticultural significance and in preserving and maintaining the reputation and integrity of its wine industry in out-of-state and foreign markets outweigh the indirect effect of section 25241 on interstate commerce.

Failing its commerce clause and free speech claims, Bronco claims section 25241 effects a total taking of its federal COLAs, in violation of the takings clause of the federal constitution, because it effectively nullifies the total value of the COLAs issued for any brand name that contains a true appellation of origin outside Napa County. We shall deny the challenge because section 25241 does not bar Bronco from using its brand names under all circumstances and because Bronco has failed to establish the statute has destroyed the substantial economic value of the brand names.

Factual and Procedural Background

According to Bronco, it specializes in "premium wines at affordable prices." Some of Bronco's wine is bottled at its wineries in Ceres and Sonoma County; other Bronco wines are bottled under contract by Barrel Ten Quarter Circle, Inc. at a recently completed winery in Napa, California.

Bronco sells its wine to wholesalers and much of it is destined for interstate commerce.

Bronco's wines are bottled and distributed under some 30 labels or brand names. All of the labels have been reviewed and approved by federal regulators from the Bureau of Alcohol, Tobacco, and Firearms (BATF) and COLAs were issued authorizing the use of the labels. (27 C.F.R. §§ 13.1-13.92 (2002).³) We discuss the nature of a COLA in greater detail in Part III of the Discussion.

Among Bronco's brands that fall within the class of "brand names of viticultural significance" are "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners" (hereafter Brands). The Brands collectively appear on hundreds of federally approved labels. Examples of current labels used by petitioners bearing these Brand names can be seen in the appendix to *Bronco Wine, supra*, 33 Cal.4th at page 998. The brand name appears prominently at the top of each label. Below the brand name appears the designation of the wine, i.e. the grape varietal (White Merlot, Chardonnay, and Merlot respectively), and below that appears the appellation of origin of the grapes used in the wine (Lodi, Lodi, and Stanislaus County respectively).

Bronco acquired the Brand names and the labels on which they appear from predecessor owners.⁴ The Napa Creek Winery brand name was introduced in 1981 and was acquired by Bronco in 1993. Rutherford Vintners originated in the early 1970s and was acquired by Bronco in 1994. The Napa Ridge brand name has been in trade since the early 1980's. Bronco purchased that name from Beringer Wine Estates in January 2000 for over \$40 million.

Beringer was granted COLAs for Napa Ridge and

³ All further citations to the Code of Federal Regulations are to the 2003 edition unless otherwise noted.

⁴ Bronco owns federal trademark registrations for "Napa Ridge" and "Napa Creek Winery."

used that name with wines made from grapes grown in the Central Coast, North Coast, and Lodi appellation areas, as well as the Napa Valley appellation area.⁵ The labels on the Beringer wines displayed a true and correct appellation of origin disclosing the place where the grapes used to produce the wine were grown. The wine sold by the prior owner of the Napa Creek Winery brand name and most of the wines previously sold by the prior owner of the Rutherford Vintners brand name had been made from Napa County grapes. (See *Bronco Wine, supra*, 33 Cal.4th at p. 951.)

By contrast, Bronco has marketed its wine under all three Brands with wine made from grapes grown entirely outside Napa County. (*Bronco Wine, supra*, 33 Cal.4th at pp. 951-952.) Bronco's annual sales of wines under these Brands amount to 300,000 cases with annual gross revenues of \$17 million. Of this amount, approximately 28 percent is attributable to sales within California and the remaining 72 percent is attributable to sales outside California.

More recently, the Bronco bottling facility in Napa County was completed and will have an annual production capacity of 44.8 million gallons of wine or 18 million cases when the facility is at full capacity. Although that level has not yet been reached, the potential output is double the 9 million cases of wine produced annually by Napa Valley wineries. (See *Bronco Wine, supra*, 33 Cal.4th at p. 950.)

Prior to 2000 California generally incorporated the federal standards for wine labels for all purposes. (Cal. Code Regs. tit. 17, § 17075. In 2000, the Legislature enacted section 25241 after receiving substantial public comment and conducting public hearings. (Stats. 2000, ch. 831, § 1.) The operative provision states in pertinent part: "No wine

⁵ At oral argument counsel for Bronco asserted that Beringer marketed a high volume of wine made from non-Napa County grapes under the Napa Ridge label. However, counsel failed to provide a citation to the record to confirm this claim. We decline to consider it.

produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a (now section 4.25⁶) of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240." (§ 25241, subd. (b).)

In support of this enactment, the Legislature made the following findings: "(a)(1) . . . for more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County. [¶] (2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices. [¶] (3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin." (§ 25241, subd. (a).)

⁶ Under the federal regulations, an American Viticultural Area (AVA) is defined as "[a] delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined . . . (27 C.F.R. § 4.25(e)(1)(i).) To qualify to use an AVA on a wine label, no less than 85 percent of the wine must be made with grapes grown within that viticultural area. (27 C.F.R. § 4.25(e)(3)(ii).)

The Legislative history discloses that section 25241 was designed to halt the sale and advertisement of wine bearing the prohibited Brands by closing a so-called "loophole" created by an exception in the federal wine labeling regulatory scheme, referred to as the "grandfather clause." (*Bronco Wine, supra*, 33 Cal.4th at p. 953.)⁷ While the federal regulations governing brand names are generally coextensive with the prohibition expressed in section 25241 (see 27 C.F.R. § 4.39(i)(1) ["... a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named"]), the federal regulations except from this rule "brand names used in existing certificates of label approval issued prior to July 7, 1986." (27 C.F.R. § 4.39(i)(2).) These excepted brand names may be used as long as the label states the correct appellation of origin or some other statement that is "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." (27 C.F.R. § 4.39(i)(2)(B)(iii).) Petitioners' labels comply with this exception by specifying the correct appellation of origin, i.e., Lodi or Stanislaus County.

Pursuant to an inquiry by Bronco made after passage of section 25241, the Department of Alcoholic Beverage Control (the Department) advised Bronco that it intended "to enforce Section 25241 pursuant to its terms" and that if Bronco continues to use its labels in violation of section 25241, "the Department may take disciplinary action against the license of Bronco Wine Company, up to and including revocation of [Bronco's] license."

On December 22, 2000, Bronco filed an original petition for writ of mandate in this court seeking to enjoin respondents (the Department and its then Interim Director, Manuel R. Espinoza, currently Jerry R. Jolly, Director) from

⁷ The legislative history is replete with statements regarding the worldwide reputation of Napa Valley wines and the necessity of closing the federal loophole to protect that reputation.

enforcing section 25241. Bronco asserted that section 25241 was preempted by the grandfather clause of 27 Code of Federal Regulations section 4.39(i)(2), and that it violated its rights of free speech under the California and United States Constitutions, the commerce clause, and the takings clause of the Fifth Amendment to the United States Constitution. Without addressing the last three claims, we issued a peremptory writ of mandate after finding that section 25241 is preempted by federal law.

On respondent's petition for review, the California Supreme Court reversed the judgment, finding that section 25241 prohibits what federal law does not prohibit and concluding the section does not stand as an obstacle to the accomplishment and execution of the purpose and objectives of federal law because there is a long history of concurrent state and federal regulation of wine labels, including the regulation of brand names that suggest the place of origin of the grapes used in making the wine. (*Bronco Wine, supra*, 33 Cal.4th at pp. 992, 995-997.) The court reversed the judgment and remanded the case to this court to address Bronco's remaining constitutional claims. (*Bronco Wine, supra*, 33 Cal.4th at p. 997.)

We do so.

Discussion

I

Free Speech

We begin with the free speech claims because the analysis of the interests served by the California legislation are a predicate to the analysis of the commerce clause and takings claims.

Bronco contends section 25241 violates its free speech rights under the United States and California Constitutions.⁸ It

⁸ Citing few California cases and without engaging in any meaningful analysis under California law, Bronco claims section 25241 violates its

argues the Legislature had insufficient evidence before it to reasonably conclude that its brand names of viticultural significance are misleading or that Bronco's labels are inherently misleading. It further argues that section 25241 is a content-based regulation subject to strict scrutiny, but also fails the less rigorous test applied to commercial speech under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* (1980) 447 U.S. 557 [65 L.Ed.2d 341] (*Central Hudson*).

Respondents contend section 25241 is a regulation of deceptive and misleading commercial speech that is not entitled to First Amendment protection. We agree with respondent.

Under the First Amendment to the United States Constitution,⁹ commercial speech is entitled to protection from governmental regulation (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 762 [48 L.Ed.2d 346, 358-359]), although it is entitled to less protection than other constitutionally guaranteed speech. (*Central Hudson, supra*, 447 U.S. at pp. 563, 566 [65 L.Ed.2d 349, 351]; *Lorillard Tobacco Company v. Reilly et al.* (2001) 533 U.S. 525, 555 [150 L.Ed.2d 532, 559] (*Lorillard Tobacco Co.*)

Commercial speech is "expression related solely to the economic interests of the speaker and its audience" (*Central*

free speech rights under the California Constitution. While the California provision protecting free speech rights (art. I, § 2, subd. (a)), has been construed as "'more definitive and inclusive than the First Amendment'" (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908, quoting *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658), Bronco cites no California cases holding the California provision broader with respect to false, deceptive, or misleading commercial speech. Because this case involves inherently misleading commercial speech, we will confine our analysis to petitioners' First Amendment claims.

⁹ The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . (U.S. Const., 1st Amend.)

Hudson, supra, 447 U.S. at p. 56 [65 L.Ed.2d at p. 348]) and “does no more than propose a commercial transaction” (*Va. State Ed. of Pharmacy v. Va. Citizens Consumer Council, supra*, 425 U.S. at p. 776 [48 L.Ed.2d at p. 367].) To that end, it serves the economic interests of the speaker, while assisting consumers and furthering the societal interest in the free flow of commercial information. (*Id.* at pp. 765 [p. 360].)

The court in *Central Hudson* set forth a four-part analysis for evaluating the constitutionality of restrictions on commercial speech. The first inquiry is “whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” (*Central Hudson, supra*, 447 U.S. at p. 566 [65 L.Ed.2d at p. 351].)

As the Supreme Court has recently made clear, commercial speech is not subject to the test of strict scrutiny. (*Lorillard Tobacco Company, supra*, 533 U.S. at pp. 554-555 [150 L.Ed.2d at p. 559].) “[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.” (*Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383 [53 L.Ed.2d 810, 835].) “The First Amendment’s concern for commercial speech is based on the informational function of advertising. [Citations omitted.] Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication *more likely to deceive* the public than to inform it” (*Central Hudson, supra*, 447 U.S. at p. 563 [65 L.Ed.2d at p. 349], italics added.)

Thus, our inquiry is whether the speech regulated by section 25241 is unlawful or misleading. Where it is claimed the speech is misleading, the Supreme Court has distinguished between "inherently misleading" speech and "potentially misleading" speech. (*In Re R.M.J.* (1982) 455 U.S. 191, 203 [71 L.Ed.2d 64, 74]; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* (1985) 471 U.S. 626, 638 [85 L.Ed.2d 652, 664] (*Zauderer*).) If "advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive," the speech is unprotected. (*In Re R.M.J.*, *supra*, at p. 202 [71 L.Ed.2d at p. 73].) If the speech is only "potentially misleading," because "the information also may be presented in a way that is not deceptive," the regulation must satisfy the remaining three factors specified in *Central Hudson*. (*Id.* at p. 203 [p. 74].)

Once it is determined that commercial speech is inherently misleading, our inquiry ends. (*Central Hudson*, *supra*, 447 U.S. at p. 566 [65 L.Ed.2d at p. 351]; *In Re R.M.J.*, *supra*, 455 U.S. at p. 203 [71 L.Ed.2d at p. 74]; *Zauderer*, *supra*, 471 U.S. at p. 638 [85 L.Ed.2d at p. 664]; *Friedman v. Rogers* (1979) 440 U.S. 1, 9 [59 L.Ed.2d 100, 110] (*Friedman*).) In such a case there is no First Amendment interest at stake and the tests which measure the validity of the state's interest in regulating free speech do not apply.

Friedman, *supra*, 440 U.S. 1 [59 L.Ed.2d 100], is instructive. The court held that Texas could prohibit the deceptive use of trade names by optometrists. It said the use of a trade name in connection with an optometrical practice is a form of commercial speech that has no intrinsic meaning. This is so because a trade name conveys no information about the price or nature of the services offered until it acquires meaning over time when the public forms associations between the name and some standard of price or quality. (*Id.* at pp. 11-12 [pp. 111-112].) For that reason "the restriction on the use of trade names has only the most incidental effect

on the content of the commercial speech" (*Id.* at pp. 15-16 [pp. 113-114.]

The court in *Friedman* found the possibilities for deception numerous, citing as an example the fact that a trade name of an optometrical practice may remain unchanged despite changes in staff whose degree of skill and care patients have come to rely upon. "[T]he public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice." (440 U.S. at p. 13 [59 L.Ed.2d at p. 112].) The court found the concerns of the Texas legislature about the deceptive and misleading use of trade names were not speculative or hypothetical but were based upon specific practices that the legislature was familiar with. (*Ibid.*)

Bronco does not dispute that brand names are commercial speech. Indeed, brand names, like the trade names at issue in *Friedman*, *supra*, have no intrinsic meaning. Since they are transferable they do not necessarily reflect the continued quality of the product offered and need not convey information about the nature, quality, or origin of the product unless associations have been made by the public over time. (*Friedman*, *supra*, 440 U.S. at p. 12 [59 L.Ed.2d at p. 111].)

While a brand name generally does not have intrinsic meaning, a brand name of geographic or viticultural significance conveys information about the geographic source of the grapes used to make the wine. For that reason a brand name of geographic significance is entitled to First Amendment protection as commercial speech only if the information about the source of the wine is accurate. To the extent a brand name of geographic significance is more likely to deceive the public than to inform it because it is suggestive of a false or misleading source of the grapes used in making the wine, it is inherently misleading and its use may be prohibited. (*Central Hudson*, *supra*, 447 U.S. at p. 563 [65 L.Ed.2d at p. 349]; *Lorillard Tobacco Company*, *supra*, 533 U.S. at pp. 554-555 [150 L.Ed.2d at p. 559].)

Section 25241 imposes restrictions on brand names by prohibiting the use of the word "Napa," or the name of any federally recognized viticultural area within Napa County in a brand name unless the wine is sourced with grapes from Napa County. (§ 25241, subd. (b).) In enacting the section, the Legislature found that "Napa Valley and Napa County have been widely recognized for producing grapes of the highest quality" and that "consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County . . . as denoting that the wine was created with the distinctive grapes grown in Napa County." (§ 25241, subd. (a)(1).) The Legislature further found that consumers are confused and deceived by wine labels, packaging, or advertisements that bear Napa appellation brand names on wines not made from grapes grown in Napa County. (§ 25241, subd. (a)(2).) Thus, the purpose of section 25241 is to eliminate the use of inherently misleading geographic brand names.

Bronco contends the Legislature had no evidence of consumer confusion when it enacted section 25241. It would require trial-type evidence as the measure whether Bronco's labels are misleading. Bronco has misunderstood the posture of the case. This is a facial attack on a statute. The test is whether the Legislature could reasonably conclude, on the basis of the record before it, that the particular brand names of geographic or viticultural significance concerning Napa County "are more likely to deceive the public than inform it" about the origin of the grapes used to produce the wine when the grapes are not grown in the area signified.

It is true that facts about Bronco's purchase and use of brand names and COLAs were at the center of the Legislature's concerns when it enacted section 25241. However, that does not change the question before us, whether the Legislature had a sufficient factual basis for making its findings. Because the Legislature may consider specific practices that come to its attention when legislating to

remedy a problem (*Friedman, supra*, 440 U.S. at p. 13 [59 L.Ed.2d at p. 112]), the standard of review remains the same and we may consider those practices as part of the record considered by the Legislature.

When reviewing an enactment to determine whether it is supported by an adequate factual basis, the courts look to the legislative record relevant to the provision. (*United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 820-822 [146 L.Ed.2d 865, 883-885] [record inadequate where no legislative record to support a floor amendment].) The record may include consumer surveys, studies, and anecdotal evidence (*FTC v. Brown & Williamson Tobacco Corp.* (D.C. Cir. 1985) 778 F.2d 35, 40-41; *Florida Bar v. Went for It, Inc.* (1995) 515 U.S. 618, 628 [132 L.Ed.2d 541, 552]; *Edenfield v. Fane* (1993) 507 U.S. 761, 771 [123 L.Ed.2d 543, 556]), and specific practices of which the Legislature was aware. (*Friedman, supra*, 440 U.S. at p. 13 [59 L.Ed.2d at p. 112].) Where the possibility of deception is self-evident, the state need not conduct a survey of the public before the court may determine that the prohibited speech is misleading. (*Zauderer, supra*, 471 U.S. at p. 653 [85 L.Ed.2d at p. 673]; see also *FTC v. Brown & Williamson Tobacco Corp., supra*, 778 F.2d at p. 40.) “[E]ven . . . a case applying [a] strict scrutiny” test of the validity of restrictions on speech may be “based solely on history, consensus, and ‘simple common sense.’” (*Florida Bar v. Went for It, Inc., supra*, 515 U.S. at p. 628 [at p. 552] quoting *Burson v. Freeman* (1992) 504 U.S. 191, 211 [119 L.Ed.2d 5, 22; *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 50-51 [89 L.Ed.2d 29, 40].)

Prior to enactment of section 25241, the Legislature held hearings, took testimony, and made findings of fact, concluding that the names Napa or any appellation suggesting a viticultural region within Napa County on labels of wine made from non-Napa grown grapes are likely to mislead consumers. (§ 25241, subd. (a)(2).) This finding is supported

by the regulatory history of brand names of geographic significance, as well as the testimony¹⁰ and survey considered by the Legislature.

Indeed, Bronco's claim the Legislature's finding of fact is unsupported by the evidence ignores the significance of appellations of origin. It is beyond dispute the place where the grapes are grown is a significant factor contributing to the quality of wine made from the grapes and is one of two factors considered by consumers when purchasing wine.¹¹ It is also beyond dispute that Napa grapes are known for their premium quality.¹² As a result, wines made from Napa

¹⁰ The Legislature heard testimony given by representatives of the Napa Valley Vintners Association (NVVA), the California Retailers Association, the Family Wine Makers of California, wine retailers, winery owners, and representatives of Bronco and its attorneys. Communications from constituents were received on behalf of wine producers, retailers, the Napa County Board of Supervisors, and restaurants, all expressing concern about the misuse of geographic brand names that imply the wine is sourced with grapes grown in the Napa Valley when in fact it is not.

¹¹ The evidence established that the location where the grapes are grown is very significant to the quality of the wine produced and is of great concern to wine consumers who have developed an expectation as to the qualities and characteristics of the grapes from a particular appellation. One wine retailer testified that the consumer asks two questions when selecting wine; one relating to the type of wine, the other relating to the location or source of the wine.

¹² Volker Eisele, President of the Napa Valley Grape Growers Association, testified that the unique conditions present in the Napa Valley produce grapes of exceptional quality. The ice-cold Japan air stream in the Pacific provides the necessary cooling without which the grapes would not have their character, color, and intensity. The enormous diversity of microclimates and soils allow grape growers to plant many different varieties of grapes with outstanding results, from cooler areas where Pinot Noir and Chardonnay thrive to the warmer locations where Cabernet Sauvignon and its relatives have achieved worldwide recognition. Globally, few regions have comparable growing conditions. Napa Valley's unique conditions have turned its wine industry into "the locomotive" that pulls the rest of the state's wine industry. As a result of Napa Valley's worldwide reputation as a preeminent wine-producing region, Napa Valley wines command premium prices.

Valley grapes command a premium price.¹³

Because there is a causal link between the quality of the wine and the grape's origin and a semantic link between Napa County and quality wine, a brand name such as Napa Ridge or Napa Creek Winery is naturally associated with grapes from the Napa Valley. The clear implication from such brand names is that the wine is made from Napa Valley grapes and is of premium quality. If it were otherwise, Bronco would not have spent \$40 million dollars for the brand name Napa Ridge and built a bottling facility in Sonoma with the capacity to bottle 18 million cases of wine annually.¹⁴ Indeed, Bronco did not purchase the vineyards or winery that produced Napa Ridge wine. It only purchased the brand name. It is reasonable to assume Bronco concluded the name Napa Ridge, by itself, is valuable because it has name recognition that signifies quality.¹⁵

However, if the wine produced under such a name is not made with Napa Valley grapes, it is marketed as something it is not while benefiting from the reputation of

¹³ Testimony at one of the legislative committee hearings established that in 1999, the average price for Napa Valley Cabernet Sauvignon grapes was \$2,500 a ton compared to Lodi Cabernet Sauvignon grapes, which sold for \$600 a ton. The largest harvest of Cabernet Sauvignon grapes in the state is grown in Lodi, an amount substantially larger than that grown in Napa Valley.

¹⁴ When testifying before the Senate testimony, Fred Franzia, Chief Financial Officer of Bronco Wine Company, was asked whether the increased production capacity was going to be used to mislead consumers into buying wine with a Napa name but made from grapes grown elsewhere. He replied: "Let me tell you what. If I could sell 18 million cases of Napa Ridge, I'd be one happy guy." Franzia advised the committee that his "basic premise in doing things is to make money and I'm putting that operation up there at the request of customers to bottle wines there in addition to our other ones and we'll be in the money-making business."

¹⁵ This is the implied ground upon which Bronco makes a brand equity argument supporting its takings claim.

Napa Valley wine. Bronco's actions belie its claim that using its Brands on wine produced with non-Napa Valley wine is not misleading. This conclusion is confirmed by survey evidence commissioned by intervenor that was before the Legislature.¹⁶ The survey concluded that the use of the name "Napa Valley" in a brand name led the survey respondent to believe the wine was sourced from grapes grown in Napa Valley.¹⁷ Thus, it is clear from the record before the Legislature that the use of the word Napa in a brand name causes the consumer to believe the wine is made from grapes grown in the Napa area.

Looking to other jurisdictions, we find that in 1977, Oregon adopted an administrative regulation similar to section 25241. (Former Or. Admin. R. 845-010-0292 (6)(e) (1977); see *Bronco Wine, supra*, 33 Cal.4th at p. 984.) As currently formulated and renumbered, it prohibits the use of an appellation of origin, including names of Oregon counties and viticultural areas located wholly or partially in Oregon (such as Willamette Valley, Umpqua Valley and Rogue Valley) "that may be mistaken for an approved appellation of origin in a brand name, in a winery name, or in any other manner on a wine label unless the wine meets the requirements for use of that appellation of origin." (Or. Admin. R. 845-010-0920(3) and (4)(f) (2005).)

Federal regulators have also found that brand names

¹⁶ Although Bronco complains that respondents have failed to submit copies of this survey, the United States Supreme Court has stated that copies of the actual survey need not be provided to the court when justifying restrictions on speech. (*Florida Bar v. Went for It, Inc., supra*, 515 U.S. at p. 628 [132 L.Ed.2d at p. 552].)

¹⁷ The results of that poll show that 99 percent of those polled thought a wine with the brand name "Napa Valley Caves" was from Napa Valley; 81 percent believed it was confusing if the brand name included the word "Napa" but the grapes did not come from Napa Valley; 91 percent felt it was deceptive to use a geographic region known for wine in a brand name even if the grapes came from another region; 82 percent indicated the brand name is important when purchasing wine.

of viticultural significance are misleading when the brand name does not accurately reflect the wine's true origin. In 1986, the BATF promulgated new regulations relating to brand names of geographic significance. For new brand names, the regulations prohibit the use of a brand name of geographic significance "unless the wine meets the appellation of origin requirements for the geographic area named." (27 C.F.R. § 4.39(i)(1).) The BATF found "[t]he brand name, usually the most prominent item on a wine label, in certain instances conveys information to the consumer. In the case of a geographic brand name of viticultural significance, [B]ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown." (51 Fed. Reg. 20480, 20481 (June 5, 1986).) The BATF concluded the use of the word "brand" or the specification of the appellation of origin on the label was insufficient to dispel a misleading impression. (51 Fed. Reg. *supra*, at p. 20481.)

The BATF did adopt, as to brand names of geographic significance used in COLAs issued prior to July 7, 1986, a grandfather clause that allows the holder of the COLA to use a geographic brand name for wine that is not made with grapes from the named geographic area if the wine is labeled with a *true appellation* of origin. (27 C.F.R. § 4.39(i)(2)(ii).)¹⁸ However, this exception to the general rule

¹⁸ Section 4.39(i)(2) of the 27 Code of Federal Regulations provides: "For brand names used in existing certificates of label approval issued prior to July 7, 1986:

(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

(ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either:

(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state; or;

(B) A state, county or a viticultural area, if the brand name bears a state name; or

was the result of a compromise between the economic interests of wineries which owned existing brand names and the interests of prospective consumers likely to be misled by them. (See 51 Fed. Reg., *supra*, at p. 20482.) The regulatory history indicates that prior to enactment of the grandfather clause, the BATF stated, in reference to a proposed rule strictly regulating the use of terms of viticultural significance in brand names, its belief "the wine industry should be allowed flexibility in selecting brand names under which to market their products without having a whole class of brand names become totally unusable." (49 Fed. Reg. 19330, 19331-19332 (May 7, 1984); see *Bronco Wine*, *supra*, 33 Cal.4th at p. 987, fn. 70.) Because the compromise is based upon policy considerations rather than findings of fact, the grandfather clause does not undermine the findings made by either the BATF or the California Legislature that the use of geographic brand names is misleading when used for wine made from grapes grown outside the named geographic area

Moreover, contrary to Bronco's assertion, there is nothing in the federal rulemaking history to suggest the Brands at issue acquired a "secondary meaning" sufficient to dispel a misleading impression regarding the origin of the grapes used to produce the wine. To the contrary, because brand names are transferable and Bronco acquired these Brands during the 1990's, any "secondary meaning" acquired prior to Bronco's purchase would not necessarily reflect on the quality of Bronco's wine. (*Friedman*, *supra*, 440 U.S. at pp. 15-16 [59 L.Ed.2d at pp. 113- 114].)

(iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer."

Nevertheless, Bronco argues, with supporting declarations by wine experts, that wine consumers who are sophisticated enough to consider the origin of a wine when selecting it, will not be misled by the brand names because they understand that the appellation of origin specified on the label indicates the true location of the grape source. We disagree.

Even if we assume some consumers are not misled, the Legislature could reasonably conclude that not all wine consumers are equally knowledgeable. Although more sophisticated wine consumers may not be misled by a brand name of viticultural significance that does not meet the appellation of origin requirements, other wine consumers are unaware of the technical meaning of the term "appellation of origin," and do not understand the significance of the specification of origin on the label. At the same time, these less sophisticated wine consumers are sufficiently aware of Napa Valley and its reputation as a premium wine growing region and consider that factor when purchasing wine. Moreover, consumers in other states or foreign countries who are knowledgeable about appellations of origin may not be sufficiently knowledgeable about Northern California and Napa County geography to know that Lodi or the North Coast are not within Napa County or that Napa Valley is not a coastal region. In addition, a consumer who purchases wine from a menu in a restaurant may not see the bottle before ordering and therefore may not be informed of the correct appellation of origin at the time the wine is ordered. (*Bronco Wine, supra*, 33 Cal.4th at p. 952, fn. 5.) As a result, the specification of a true appellation of origin may not be sufficient to dispel the misleading impression given by the geographic brand name.

Likewise, the Legislature could make a similar finding with respect to brand names using sub-appellations of Napa County. Unsophisticated wine consumers who are not conversant with the term "appellation of origin" and are

unaware of the significance of its designation on a wine label, may nevertheless be sufficiently knowledgeable about Northern California and Napa County geography to know that areas such as Rutherford, St. Helena, Stags Leap District, and Oakville, are areas within Napa County. These consumers may assume that a wine sold under a brand name that includes one of these areas is a wine that is produced from Napa County grapes.

Bronco also attempts to raise an as-applied challenge on the theory its labels are only potentially misleading. It argues that there was no evidence consumers were misled by its labels, its labels are not inherently misleading or deceptive, and such a conclusion is inconsistent with the considered judgment of the BATF, which has determined that as a matter of fact, Bronco's brand names are not misleading.¹⁹

Bronco fares no better with its as-applied challenge because it has failed to establish that its labels are not inherently misleading. Although Bronco's expert testimony suggests that sophisticated consumers would not be misled by its labels, as we have noted, not all consumers are equally knowledgeable and, as the Legislature found, many consumers are in fact confused and deceived by labels with geographic brand names. Because the federal regulations do not preempt section 25241 (*Bronco Wine, supra*, 33 Cal.4th at pp. 995-997) and the grandfather clause is based on a policy decision rather than a factual finding, issuance of a COLA does not constitute a finding of fact that overrides a contrary

¹⁹ Bronco also argues that it uses its Brands as "trademarks," not statements of geographic origin, and that a trademark that is "primarily geographically deceptively misdescriptive" of the goods nevertheless can be registered as a federal trademark if the mark "has become distinctive of the applicant's goods in commerce." (See 15 U.S.C. § 1052(e)(3) & (f). We fail to see the relevance of this assertion in the context of a First Amendment claim, which provides no protection to a trademark that is "deceptively misdescriptive." (See *Friedman, supra*, 440 U.S. at pp. 15-16 [59 L.Ed.2d at pp. 113-114].)

finding by the California Legislature].)²⁰

Thus, Bronco's reliance on *Peel v. Attorney Registration & Disciplinary Comm'n* (1990) 496 U.S. 91 [110 L.Ed.2d 83] (designation on letterhead of certification as civil trial specialist facially true); *Zauderer, supra*, 471 U.S. 626 [85 L.Ed.2d 652] (advertising by attorney contained illustration and legal advice that were nondeceptive); and *In re R.M.J., supra*, 455 U.S. at p. 203 [71 L.Ed.2d at p. 74] (advertising by attorney contained truthful list of areas of practice) is misplaced. Bronco claims its Brands fall into the category of potentially misleading commercial speech and the remedy is additional disclosure rather than a ban on speech. We have already found that Bronco's labels involve inherently misleading speech. Accordingly, use of them may be banned. (*Central Hudson, supra*, 447 U.S. at p. 566 [65 L.Ed.2d at p. 351].)

Bronco also raises two related equal protection claims, contending that section 25241 targets the speech of a

²⁰ At oral argument Bronco's attorney cited *Piazza's Seafood World, LLC v. Boh Odom, Commissioner, Louisiana Dep't of Agriculture & Forestry* (E.D. La. 2004) ____ Supp.2d ____, as support for the proposition we may go behind the Legislature's findings and apply the standard for potentially misleading speech. *Piazza's Seafood World* does not advance Bronco's claim.

In *Piazza's Seafood World*, an importer of seafood raised a First Amendment challenge to Louisiana's catfish labeling law. The law banned the sale of food products under the name "Cajun" unless the food was grown, raised, produced, or substantially transformed in Louisiana. The plaintiff marketed catfish grown in China under the trade name "Cajun Boy" with labels that clearly disclosed the fish came from China. The court found the use of the trade name was only potentially misleading because the catfish was marketed to a sophisticated group of wholesalers who would discern from the label that the fish came from China.

By contrast, section 25241 seeks to protect the ultimate consumer who may be less sophisticated than a wine wholesaler and the consumer's familiarity with an appellation of origin such as Lodi or Stanislaus County cannot be compared with a consumer's familiarity with a country such as China.

particular speaker. First it argues that section 25241 is subject to strict scrutiny because it discriminates among speakers with respect to fundamental rights. We disagree.

We have already noted that strict scrutiny does not apply to commercial speech. (See *Lorillard Tobacco Company, supra*, 533 U.S. at pp. 554-555 [150 L.Ed.2d at p. 559].) Since section 25241 bars only misleading commercial speech, which is wholly unprotected, Bronco fares no better under the Equal Protection Clause than under the First Amendment. (*City of Renton v. Playtime Theatres, supra*, 475 U.S. at p. 55, fn. 4 [89 L.Ed.2d at p. 42].)

Second, Bronco argues that section 25241 is underinclusive because it fails to regulate non-Napa brand names as well as sub-appellations within Napa County. With respect to non-Napa brand names, Bronco points out the section does not affect grandfathered brand names that use geographical brand names outside Napa County where the wine does not meet the appellation requirements for that appellation. For example, brand names such as "Monterey Peninsula" and "Sonoma Creek," are not prohibited by the statute despite the fact the wines are not sourced with grapes from the corresponding viticultural area of Monterey (27 C.F.R. § 9.98 (1987) or Sonoma valley. (27 C.F.R. § 9.29 (1987).)

With respect to the sub-appellations within Napa County, Bronco complains that the statute allows smaller viticultural appellations within Napa County to use the general Napa County appellation requirement rather than the more limited viticultural appellation within the county despite the fact the wine is not sourced from the named viticultural area. Examples of these brand names are "Guenoc," "Stag's Leap Wine Cellars," "Rutherford Hill" and "Wild Horse," which are permissible under the statute. (27 C.F.R. § 9.26 (1981) (Guenoc); 27 C.F.R. § 9.117 (1989) (Stag's Leap District); 27 C.F.R. § 9.133 (1993) (Rutherford); 27 C.F.R. § 9.124 (1988) (Wild Horse Valley).)

We find no constitutional impediment to regulation. Because inherently misleading speech is unprotected speech (*Central Hudson, supra*, 447 U.S. at p. 563 [65 L.Ed.2d at p. 349]; *City of Renton v. Playtime Theatres, supra*, 475 U.S. at p. 55, fn. 4 [89 L.Ed.2d at p. 421]), the Legislature may proceed step by step to limit misleading speech in the same manner as it would eliminate other perceived evils. The Legislature "need not 'strike at all evils at the same time or in the same way,' [but] . . . 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 466 [66 L.Ed.2d 659, 670] quoting *New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [49 L.Ed.2d 511, 517]; see also *United States and Federal Communications Commission v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 434 [125 L.Ed.2d 345, 360].)

Here, the Legislature could reasonably conclude that while the use of brand names of geographic significance causes consumer confusion, not all such names pose the same threat to the reputation and integrity of the Napa Valley wine growing region. Section 25241 was designed to eliminate a specific threat. Nor does section 25241 target a particular speaker. It bans an entire class of unprotected speech, the use of a Napa area brand name on labels of non-Napa County wines. There are 35 grandfathered brand names that are prohibited by the statute and Bronco's brand names comprise but three of them. Because Napa County is California's preeminent wine producing region, which also consists of a number of smaller viticultural areas within it, the Legislature has recognized Napa County as a single, cohesive wine growing area. (§ 25240 [requiring the Napa name to appear in direct conjunction with all Napa sub-appellations].) For this reason, the Stag's Leap Winery may use non-Stag's Leap area grapes, but the Stag's Leap wine label must bear the Napa

County appellation and must comply with the requirement that 75 percent of the grapes used to produce its wine originate in Napa County (§§ 25240, 25241; 27 C.F.R. 4.25(a) and (b)), thereby ensuring the integrity and high quality of Napa County wines.

The fact the Legislature took notice of petitioners' trade practices, their recent purchase of three grandfathered Brands, and their new bottling facility in Napa County shows it recognized a growing problem that had reached a critical threshold with respect to California's premier wine growing region and decided to take action to correct it. The Legislature regulated a deception where experience showed it to be most felt.

In summary, federal and state regulators, the wine industry, and the general public view the origin of the wine as a significant factor affecting its quality and consider the use of a geographic brand name misleading where the wine is not made with grapes grown in the named geographic area. Accordingly, the Legislature was standing on firm ground when it concluded the name Napa in a brand name is inherently likely to mislead consumers when the grapes used to make the wine are not grown in the Napa Valley.

II.

Commerce Clause

Bronco contends section 25241 violates the dormant commerce clause because it has an extraterritorial effect and directly regulates and unduly burdens interstate and foreign commerce in wine. The challenge is made to labels on wine destined for sale in interstate commerce.

Respondents and intervenor counter that section 25241 does not violate the commerce clause because the provision regulates wholly intrastate activities and the indirect or incidental effect on interstate commerce is outweighed by the state's legitimate interests in protecting California wine

consumers from misleading wine labels, as well as the integrity, reputation, and value of its premier Napa Valley wine industry. We agree with respondents.

Bronco assumes its commerce clause claims are unrelated to the determinations made incident to the resolution of its preemption claims by the California Supreme Court. The court concluded that Congress, in its effort to provide minimum standards for wine labels, did not foreclose the adoption of stricter standards by the states. The court said that "Bronco's assertions of implied preemption are contradicted by the long history . . . of concurrent state and federal regulations of wine labels including, historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine." (*Bronco Wine, supra*, 33 Cal.4th at p. 997.)

The Supreme Court referred inter alia to the position taken by the BATF at the time of adoption of the regulations containing the grandfather clause. "[I]t is evident that the BATF envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements . . ." (*Bronco Wine, supra*, 33 Cal.4th at p. 996.) The court cited to provisions of the Federal Register, which explained the reasons for enactment of the 1986 regulations. (51 Fed. Reg. 3773, 3774 (January 30, 1986).) The Register remarked regarding the prior regulation that "[o]ne Federal requirement for use of an American viticultural area was conformity with the laws and regulations of the state in which the viticultural area was located [§ 425a(e)(3)(v)]. Thus, wine claiming a 'Napa Valley' appellation was required by Federal regulation to conform to California law." (*Ibid.*)

The BATF explained that a "Federal requirement for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce due to the multitude of state and local laws and regulations." (51 Fed. Reg., *supra*, at pp. 3773, 3774.) Having viewed this as a federal enforcement problem, the

register says that “[s]tate laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved.” (*Ibid.*)

In most cases the federal and state regulations are congruent. The federal regulations generally authorize a state to enact label requirements in excess of those required by federal law. Thus, 27 Code of Federal Regulations part 4.25(b)(1)(1) provides that an American wine is entitled to bear a brand name of geographical significance if “at least” 75 percent of the wine is derived from grapes from the area signified. For this reason, a state requirement that 100 percent of the grapes must be derived from the area is in compliance with the federal law since it meets the “at least” requirement.

Of course, Bronco cannot comply with section 25241 and use its existing COLAs pursuant to the grandfather provisions of the federal regulation, though it otherwise can comply with both state law and the federal regulations. Nevertheless, the California Supreme Court has held the state law prevails over the federal regulations, even as to wine destined for interstate commerce, because a long history of concurrent state and federal regulatory schemes has sanctioned state laws that protect consumers of wine from misleading labeling. (*Bronco Wine, supra*, 33 Cal.4th at p. 997.) The policy runs against the claim the commerce clause was violated by the very law that Congress impliedly sanctioned. It is an example of “local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.” (*Parker v. Brown* (1943) 317 U.S. 341, 363 [87 L.Ed. 315, 333].)

The commerce clause is an express grant of authority to Congress “[t]o regulate commerce with foreign nations, and among the several states . . .” (U.S. Const., art. I, § 8, cl. 3.) This grant of authority includes an implied limitation on

the states' authority to adopt legislation that effects commerce. It is often referred to as the dormant commerce clause. (*Healy v. Beer Institute* (1989) 491 U.S. 324, 326, fn. 1 [105 L.Ed.2d 275, 281] (*Healy*); *Hughes v. Oklahoma* (1979) 441 U.S. 322, 326 and fn. 2 [60 L.Ed.2d 250, 256].)

Although dormant commerce clause jurisprudence is far from clear (*Kassel v. Consolidated Freightways Corp.* (1981) 450 U.S. 662, 706 [67 L.Ed.2d 580, 609] (Rehnquist, J., diss.) (referring to it as "hopelessly confused")), the court has traditionally used a two-tiered approach when determining whether state legislation has exceeded the bounds of its authority under the dormant commerce clause. (*Brown-Forman Distillers Corp. v. New York State Liquor Authority* (1986) 476 U.S. 573, 578-579 [90 L.Ed.2d 552, 559] (*Brown-Forman*).) A state statute is invalid *per se* if it discriminates against interstate commerce in favor of in-state economic interests or if its practical effect is to control conduct beyond the boundaries of the regulating state. (*Healy, supra*, 491 U.S. at p. 336 [105 L.Ed.2d at p. 288]; *Brown-Forman, supra*, 476 U.S. at p. 579 [90 L.Ed.2d at p. 559].) On the other hand, when "a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." (*Brown-Forman, supra*, 476 U.S. at p. 579 [90 L.Ed.2d at p. 560]; *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [25 L.Ed.2d 174, 178] (*Pike*).) The Supreme Court has noted that while there is no bright line separating these two categories of regulation, "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity." (*Brown-Forman, supra*, 476 U.S. at p. 579 [90 L.Ed.2d at p. 560].)

We therefore consider the effect section 25241 has on interstate commerce. (*United Haulers Ass'n. v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2nd Cir. 2001) 261 F.3d 245, 255.) The substantive provision of section 25241

prohibits the use of a brand name of geographical significance on any label, packaging material, or advertising, on wine unless the wine qualifies under federal regulations because the grapes used are grown in the area signified. The provision applies to wine produced, bottled, labeled, offered for sale or sold in California. (§ 25241, subd. (b).) The effect of the prohibition is to halt the sale of wine marketed under one of the affected brand names unless the brand name accurately reflects the origin of the grapes used in making the wine.

As noted, the legislative history indicates the Legislature's purpose in enacting section 25241 was to close the regulatory loophole created by the grandfather clause in the federal regulations. As that clause applies only to wine sold, shipped, or delivered for sale or shipment into interstate and foreign commerce (27 U.S.C. § 205(e)), it is clear the Legislature intended section 25241 to halt the sale and shipment of wine into interstate and foreign markets if the wine is labeled or packaged with the misleading brand names specified by the statute. It is therefore clear that section 25241 affects interstate and foreign commerce.

A. Invalid *Per Se*

Bronco argues that section 25241 directly regulates interstate commerce because the statute's practical effect is to regulate commerce wholly outside California's borders. Bronco reasons that since section 25241 applies to wine "produced, bottled, labeled, offered for sale or sold in California," it applies to wine that is sold out-of-state if produced, bottled, or labeled in California.

The commerce clause prohibits application of a state statute to commerce wholly outside the state's borders. (*Healy, supra*, 491 U.S. at p. 336 [105 L.Ed.2d at p. 288]; *Brown-Forman, supra*, 476 U.S. at pp. 581-582 [90 L.Ed.2d at pp. 561-562]; *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642 [73 L.Ed.2d 269, 2831.]) The court in *Edgar* explained the principle underlying the limitation. "In *Southern Pacific*

Co. v. Arizona, 325 U.S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the 'practical effect of such regulation is to control [conduct] beyond the boundaries of the state' The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" (*Id.* at p. 643 [at p. 283], quoting *Shaffer v. Heitner* (1977) 433 U.S. 186, 197 [53 L.Ed.2d 683, 693].)

These rules have been applied to invalidate price affirmation laws that tied the out-of-state price of goods to the in-state price of the goods (*Healy, supra*, 491 U.S. at p. 337 [105 L.Ed.2d at p. 289]; *Brown-Forman, supra*, 476 U.S. at pp. 579-582 [90 L.Ed.2d at pp 560-561]), to invalidate laws that restricted the interstate movement of goods based on the price paid for them in out-of-state transactions (*Baldwin v. G.A.F. Seelig, Inc.* (1935) 294 U.S. 511, 521 [79 L.Ed. 1032, 1037] *Lemke v. Farmers Grain Co.* (1922) 258 U.S. 50, 60-61 [66 L.Ed. 458, 465]), and to invalidate laws that required a merchant to seek regulatory approval in one state before undertaking a transaction in another state. (*Edgar v. MITE Corp., supra*, 457 U.S. at pp. 643-646 [73 L.Ed.2d at pp. 284-285]; *ANR Pipeline Co. v. Schneidewind* (6th Cir. 1986) 801 F.2d 228, 236.)

By contrast, states are not precluded from regulating the in-state components of an interstate transaction so long as the regulation furthers a legitimate state interest (*A.S. Goldinen & Co. v. New Jersey Bureau of Securities* (3rd Cir. 1999) 163 F.3d 780, 785 (upholding state law authorizing state officials to block the sale of securities from New Jersey to buyers outside the state where the offer is made intrastate)) or regulates an in-state transaction relating to produce destined for interstate commerce. (*Parker v. Brown, supra*, 317 U.S. at pp. 366-367 [87 L.Ed.2d at p. 336] (upholding a

state law regulating the production, price, and sale of raisins prior to processing and preparation for shipment into interstate commerce); *Sligh v. Kirkwood* (1915) 237 U.S. 52 [59 L.Ed. 835] (upholding the prohibition against the sale, shipment or delivery of citrus fruit that was immature or otherwise unfit for consumption).)

Because section 25241 by its terms applies to "wine produced, bottled, labeled, offered for sale or sold in California . . .," it applies only to transactions that take place within California. Nor does it have the practical effect of directly regulating sales that take place wholly outside of California.

It is Bronco's business practice to sell its wine to wholesalers within California, without regard to its intra-or interstate destination.²¹ Section 24241 applies regardless of whether the wine's ultimate destination is interstate because it applies to wine sold or offered for sale in California. The section also would apply if Bronco chose to sell its wine directly in interstate commerce because its wine is produced, bottled or labeled in California. In either case, section 25241 regulates the in-state portion of an interstate transaction, a regulation that does not exceed the territorial reach of the state. (*A.S. Goldmen & Co. v. New Jersey Bureau of Securities, supra*, 163 F.3d at p. 785.) While section 25241 will undoubtedly affect interstate commerce because of its upstream impact on the price and volume of wine ultimately

²¹ Seventy-two percent of Bronco's wine is shipped to other states and countries and Bronco's California license as a manufacturer or wine grower authorizes it, among other things, to "export" its wine, as well as to sell its wine to "persons holding wholesaler's . . . licenses . . . and to persons who take delivery of those alcoholic beverages within this state for delivery or use without the state." (§ 23356, subd. (b).)

Although Bronco is authorized to sell its wine directly into interstate and foreign commerce (*ibid*), Bronco's business practice, as authorized by statute, is to sell all of its wine to California wholesalers who then sell it to California retailers and to wholesalers or retailers outside California.

shipped to out-of-state markets, it does not directly regulate those markets. (*Freedom Holdings, Inc. v. Spitzer* (2nd Cir. 2004) 357 F.3d 205, 220.)

Bronco asserts however, that because the statute applies to wine that is bottled or produced in California, the statute operates extraterritorially by effectively prohibiting the sale and advertising of Bronco wine in national and international markets.²² As applied to Bronco, we disagree.

Section 25241, subdivision (f) provides an enforcement remedy to the Department of Alcoholic Beverages to "suspend or revoke the license of any person who produces or bottles wine who violates this section."²³ Because the provision is limited to the producer or bottler of the wine, it does not apply to merchants who sell the wine, whether they are within or without the state.

We therefore conclude section 25241 does not have an extraterritorial reach.

Relying on *Alliant Energy Corp. v. Bie* (7th Cir. 2003) 330 F.3d 904 and *Shafer v. Farmers Grain Company of Embden* (1925) 268 U.S. 189 [69 L.Ed. 909] (*Shafer*), Bronco also contends the statute is *per se* invalid because it is a direct regulation of interstate commerce. We disagree.

In *Alliant, supra*, the court considered the validity of a

²² We decline to reach Bronco's claim section 25241 has an extraterritorial reach by prohibiting it from advertising its Brands in national and international markets because Bronco has not provided us with record citations showing that it does so.

²³ "*The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.*" (§ 25241, subd. (f), italics added.)

set of Wisconsin statutory provisions regulating the corporate structure and ownership of public utilities operating in the state. The in-state incorporation provision required that a public utility holding company be incorporated in Wisconsin, which in the court's view had the effect of requiring that ultimate ownership of such company lie in a Wisconsin corporation. Applying the *Pike* balancing test rather than a *per se* test, the court found the regulation was a direct regulation of interstate commerce because "[a]n investment opportunity in a Wisconsin utility is . . . an article of interstate commerce. [Citation.] If ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of interstate commerce, i.e., the investment in the utility, is stopped at the border." (330 F.3d at pp. 912-913.)

Unlike in *Alliant*, section 25241 does not operate to quarantine Bronco's wine by prohibiting its sale outside of California. (Compare *Hostetter v. Idlewild Son Voyage Liquor Corp.* (1964) 377 U.S. 324, 325, 333 [12 L.Ed.2d 350, 352, 357] (invalidated state law prohibiting the sale of tax-free bottled wine and liquor to departing international travelers for delivery in foreign countries).) Bronco is free to sell its wine under different brand names and to use the restricted brand names on wines that meet the grape content requirements. Section 25241 only prohibits Bronco from selling its wine under a brand name that does not correctly reflect the true viticultural area of the grapes used to make the wine. As noted, to the extent that prohibition has an upstream effect on the price and volume of wine sold, it has merely an indirect effect on interstate and foreign commerce.

In *Shafer, supra*, 268 U.S. 189 [69 L.Ed. 909] North Dakota imposed numerous burdensome conditions on the processing, grading, buying, pricing, and profit margins of interstate wheat buyers who purchased the wheat in-state for the sole purpose of shipping to and selling in markets out-of-state. Finding the purchase transactions were interstate commerce, the Supreme Court concluded that by "subjecting

the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce" (268 U.S. at p. 201 [69 L.Ed. at p. 915].)

Shafer was decided at a time when the court applied a mechanical test to determine whether the regulation had a direct or indirect effect on interstate commerce. (*Parker v. Brown*, *supra*, 317 U.S. at p. 360 [87 L.Ed. at p. 331]; see also *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission* (1983) 461 U.S. 375, 390 [76 L.Ed.2d 1, 14]; *Pike*, *supra*, 397 U.S. at p. 142 [25 L.Ed.2d at pp. 178-179].)²⁴ Under that test, the courts generally upheld the

²⁴ More recently, the courts have declined to apply the direct/indirect approach to commerce clause cases. (See *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n.*, *supra*, 461 U.S. at pp. 390-394 [76 L.Ed.2d at pp. 14-16] (wholesale rates of electricity); *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279-280, 288-289 [51 L.Ed.2d 326, 331, 3371 (state taxation).) In *Parker v. Brown*, *supra*, 317 U.S. at pp. 362-363 [87 L.Ed.2d at p. 332-333]), the court explained that "courts are not confined to so mechanical a test [¶] Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' [citations] not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. [Citations.] There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it." Thus, in *Baltimore Gas & Elec. Co. v. Heintz* (4th Cir. 1985) 760 F.2d 1408 at page 1422, the court applied the *Pike* test, finding the direct/indirect approach "analytically unsound and result-oriented" (See also *DiSanto v. Pennsylvania* (1927) 273 U.S. 34, 44 [71 L.Ed. 524, 530] (Stone, J. diss.)

regulation if it was imposed on transactions that occurred before the introduction of the matter into interstate commerce. (*Ibid.*) Because the court in *Shafer* determined the regulations were imposed on the wheat market after the wheat entered the stream of interstate commerce, it concluded the statute was a direct regulation of interstate commerce. Having made that determination, the court considered the extent and nature of the regulations, which it found imposed such an unacceptable measure of control that it "directly interfer[ed] with and burden[ed] interstate commerce" (*Shafer, supra*, 268 U.S. at p. 201 [69 L.Ed. at p. 915].)

Shafer does not compel a different result here because section 25241 regulates instate activities and transactions that take place before interstate commerce begins, and is therefore an indirect regulation of interstate commerce. Since Bronco sells its wine to wholesalers wholly inside California without distinction whether the wine is to be resold instate or interstate, its wine has "no ascertainable destination without the state." (*Pike, supra*, 397 U.S. at p. 141 [25 L.Ed.2d at p. 178].) Bronco's wine does not enter the stream of interstate commerce until the wholesaler transacts to sell it across state lines. (*Shafer, supra*, 268 U.S. at p. 200 [69 L.Ed. at p. 915; see also *A.S. Goldmen & Co., supra*, 163 F.3d at p. 787.]) Because the instate activities and transactions are merely preparatory to the sale and shipment of wine in interstate commerce, section 25241 does not directly regulate interstate commerce.

We therefore turn to a *Pike* analysis.

B. *Pike* Balancing Test.

In *Pike, supra*, 397 U.S. 137 [25 L.Ed.2d 174], the Supreme Court set forth a three-factor balancing test to assess the constitutional validity of a state statute that effects interstate commerce. "Where the statute regulates even-

criticizing the direct/indirect analysis as "too mechanical, too uncertain in its application, and too remote from actualities, to be of value.")

handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, e.g., *Shafer v. Farmers Grain Co.*" (*Id.* at p. 142 [at p. 178].)

In *Pike, supra*, the court struck down an Arizona statute and order where the statute required that all cantaloupes grown in Arizona and offered for sale must be packed in a manner and type of closed containers approved by a state official. The official issued an order prohibiting a cantaloupe grower from transporting its uncased cantaloupes from its Arizona ranch to its California packing and processing facility, where the fruit would be shipped to markets nationwide. (397 U.S. at p. 138 [25 L.Ed.2d at p. 176].) The practical effect of the order was to compel the grower to build a packing facility in Arizona so that the state could regulate an operation that otherwise was performed outside the state. *Id.* at p. 141 [at p. 178].)

Applying its three-part balancing test, the court recognized the state's interest in protecting and enhancing the reputation of Arizona growers by prohibiting deceptive packaging. While recognizing the interest as legitimate), the court concluded it did not outweigh the burden on interstate commerce. The court reasoned the grower's cantaloupes were of exceptionally high quality, are processed in California and bear the name of the California packer rather

than identifying them as Arizona fruit. (397 U.S. at pp. 143-144 [25 L.Ed.2d at p. 179].) The purpose of the order forbidding the grower to pack its fruit outside Arizona was not to keep the reputation of its growers unsullied, but to compel the use of an Arizona label to enhance the reputation of the Arizona fruit through the reflected good will of the company's superior produce. The court concluded that "the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded \$200,000 packing plant in the State." (*Id.* at p. 145 [at p. 180].) In so doing, the court characterized Arizona's interest as minimal, and remarked that the consequence of the order could perhaps be tolerated if a more compelling state interest were involved. (*Id.* at p. 146 [at p. 181].)

1. The State's Interests

Respondent and intervenor contend section 25241 protects instate consumers from misleading wine labels, deters the establishment of instate fraudulent enterprises while protecting honest wine vendors, and protects the integrity and reputation of California's vital premier wine industry.

These are legitimate interests. California has a compelling interest in preserving an intrastate business climate free of fraud and deceptive business practices (*Diamond Multimedia Systems, Inc. v. Supreme Court* (1999) 19 Cal.4th 1036, 1064) and certainly may protect its own residents from such business practices. (*CTS Corp. v. Dynamics Corp. of America* (1987) 481 U.S. 69, 93 [95 L.Ed.2d 67, 88]; *A.S. Goldmen & Co. v. New Jersey Bureau of Securities, supra*, 163 F.3d. at p. 788.) The state also may protect the integrity of its markets by prohibiting false statements and transactions (*A.S. Goldmen, supra*, at p. 788), may protect the reputation of one of its premier food industries by prohibiting deceptive packaging (*Pike, supra*, 397 U.S. at p. 143 [25 L.Ed.2d at p. 179] or the sale and

delivery of fruit unfit for consumption (*Sligh v. Kirkwood*, *supra*, 267 U.S. 52 [59 L.Ed. 835]), and may require that produce packaged in-state, be packaged in a particular type of receptacle. (*Pacific States Box & Basket Co. v. White* (1935) 296 U.S. 176 [80 L.Ed. 138].) Additionally, the state has a legitimate interest in "maximizing the financial return" to one of its industries. (*Pike*, *supra*, 397 U.S. at p. 143 [25 L.Ed.2d at p. 179]; *Parker v. Brown*, *supra*, 317 U.S. at pp. 363-365 [87 L.Ed. at pp. 333-335].)

California's interest in protecting the reputation of its premier wine industry is weightier than the interest asserted in *Pike* because California seeks to protect the value of a superior product from the misleading use of brand names on an inferior product. As discussed, grapes from the Napa Valley are of significantly higher quality than grapes grown in Lodi and Stanislaus Counties. Napa Valley has a national and international reputation for producing grapes and wine of the highest quality. (§ 25241, subd. (a)(1).) Because Napa Valley wine stands at the forefront of the state's wine industry,²⁵ the Legislature has sought to protect the Napa Valley name by ensuring that wine bearing the name Napa or Napa appellation names are of the same high quality associated with grapes from that area.

Because the state has legislated to further legitimate interests, the enactment carries a presumption of constitutional validity. (*Pike*, *supra*, 397 U.S. at p. 143 [25 L.Ed.2d at p. 179].) The court cannot invalidate a statute enacted pursuant to the state's police power unless it has no reasonable relation to a legitimate purpose accomplished by

²⁵ The annual wine business of Napa Valley is approximately \$4 billion, while the total annual business of the state wine industry is \$33 billion. Napa Valley accounts for about 12 percent of the wine business in this state while producing about 4 percent of the wine. If Bronco reaches full production at its new bottling facility, its annual output would be twice that produced annually by Napa Valley wineries. (See *Bronco Wine*, *supra*, 33 Cal.4th at p. 950.)

the enactment. (*Sligh v. Kirkwood*, *supra*, 237 U.S. at p. 61 [59 L.Ed. at pp. 838- 839].)

Bronco concedes these are valid state interests in the abstract but argues that the Brands do not threaten those interests because the federal regulations are adequate to prevent consumer deception and the record fails to show consumers are actually being misled by its labels. We disagree with Bronco.

Whether a statute is necessary to further the public interest is primarily a legislative determination the courts will not second guess. (*CTS Corp. v. Dynamics Corp. of America*, *supra*, 481 U.S. at p. 92 [95 L.Ed. 2d at p. 87]; *Pacific Northwest Venison Producers v. Smitch* (9th Cir. 1994) 20 F.3d 1008, 1017.) As noted, the federal regulations created an exception to the general rule, which generally prohibits the use of misleading brand names of viticultural significance. (27 C.F.R. § 4.39(i)(1).) The exception, which we have referred to as the "grandfather clause," authorizes Bronco to use the brand names prohibited by section 25241. (See 27 C.F.R. § 4.39(i)(2).) Section 25241 was intended to close the loophole left by the exception because the Legislature found it inadequate to protect the state's interests. (*Bronco Wine*, *supra*, 33 Cal.4th at p. 953.)

As previously discussed, section 25241 contains findings made by the Legislature, including the finding that consumers were confused and deceived by the misleading practice of using Napa appellations on labels and packaging materials, and in advertising for wines made from grapes that do not qualify for a Napa County brand name, and that the prohibition was necessary to eliminate this misleading practice. (§ 25241, subd. (a)(2) and (3).)

Because, as we found in Part I, the record is adequate to support those findings, the Legislature's determination is binding on us. (*CTS Corp. v. Dynamics Corp. of America*, *supra*, 481 U.S. at p. 92 [95 L.Ed.2d at p. 87].) The state

need not prove actual fraud, but may enact legislation that serves the prophylactic purpose of preventing deception. (*A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, *supra*, 163 F.3d at p. 788.)

Bronco further argues that the state's interest in protecting against misleading brand names is significantly undermined by the statute's under-inclusiveness. We have considered and rejected this argument in Part I and reject it here for the same reasons. The Legislature reasonably found that vintners using brand names of geographic significance for areas within Napa County do not pose the same threat to the region's reputation for premier wine because the vintners produce wine with grapes from the area which are therefore of the same high caliber. Rather than undermining the area's reputation, such wines contribute to and share in that reputation.

Bronco also argues that the state's interests are undermined by the Legislature's own findings. According to Bronco, Napa County's reputation as a premier viticultural area was established during a time when brand names used Napa County place names although the wines were made with non-Napa County wines, and thus did not harm the reputation of the Napa County viticultural areas.

Bronco has not provided a record cite to support this claim. We note that, while the prior owner of the Napa Ridge brand used that name and label for wines made from grapes grown in several non-Napa County areas as well as from Napa County, "[a]ll of the wines previously marketed by the prior owner under the Napa Creek Winery brand and most wines previously marketed by the prior owner under the Rutherford Vintners brand had been made from Napa County grapes." (*Bronco Wine Co.*, *supra*, 33 Cal.4th at p. 951.) Based upon the record, the Legislature could reasonably find that wines previously made with non-Napa Valley grapes, although marketed under Napa Valley brand names, were so few in number and/or low in volume, they did not impact the

reputation or integrity of wine made from grapes grown in a Napa Valley.

2. Burden on Interstate Commerce

Bronco does not contend that section 25241 discriminates against interstate commerce or that it is less than evenhanded in its effect. Nor could it. The section applies equally to wines destined for intrastate and interstate commerce. Indeed, section 25241 is the result of a purely intrastate conflict between competing local wineries.²⁶

Bronco contends however, that section 25241 will effectively remove from interstate and foreign commerce the vast majority of labels bearing its three affected Brands, thereby depriving it of its brand equity, while depriving foreign consumers of its award-winning value priced wine.

While we agree the statute has an effect on interstate commerce, the effect does not outweigh the state's weightier interests. As respondent argues, section 25241 does not impose a quarantine by prohibiting the sale of Bronco's wine nor the use of its affected Brands. (*See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*, 377 U.S. 324 [12 L.Ed.2d 350].)

To comply with section 25241, Bronco may use its affected brand names on wine produced with Napa County grapes. It may continue to sell its award-winning, reasonably priced or "value" wine under other brand names that are not

²⁶ By contrast, in *Granholm v. Heald* (May 16, 2005, Nos. 03-1116, 03-1120, 03-1274) ___ U. S. ___ [2005 WL 1130571], the Supreme Court recently invalidated Michigan and New York state laws prohibiting out-of-state wineries from selling directly to consumers while allowing in-state wineries to do so. The high court found these laws discriminated against interstate commerce by giving in-state wineries a competitive advantage over out-of-state wineries and that such discrimination is not authorized or permitted by the Twenty-first Amendment. (___ U.S. at p. ___ L.Ed.2d at p. ___.) As stated, section 25241 does not discriminate between out-of-state and in-state wineries nor does it stop the sale of wine at the border.

misleading. The effect of the statute will be to deprive Bronco of the brand equity it has built up with its value wine. It may also create temporary consumer confusion until Bronco obtains new brand names and builds up brand equity for its newly labeled wine. As a consequence, section 25241 will undoubtedly have an effect on the volume and price of the wine sold in interstate and foreign commerce.

However, the United States Supreme Court has upheld regulations aimed at matters of local concern that have the effect of restricting the volume of goods shipped into interstate commerce. (*Parker v. Brown, supra*, 317 U.S. at pp. 363-364 [87 L.Ed. at p. 333] (state law market stabilization scheme regulated the production, price, and sale of raisins prior to processing and preparation for shipment into interstate commerce); *Sligh v. Kirkwood, supra*, 237 U.S. 52 [59 L.Ed. 835] (state law prohibited the sale, shipment or delivery of citrus fruit that was immature or otherwise unfit for consumption).)

Although application of section 25241 to Bronco may have a significant adverse financial impact on Bronco, that is not dispositive. The main concern identified in Pike, economic protectionism of state industries (*Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n., supra*, 461 U.S. at p. 394 [76 L.Ed.2d at p. 17]), is not implicated here. Section 25241 does not take aim at out-of-state wineries. To the contrary, its aim is to protect some intrastate wineries from other intrastate wineries (compare *Pete's Brewing Co. v. Whitehead, supra*, 19 F.Supp.2d at pp. 1012-1013 [invalidated a labeling regulation that discriminated against interstate commerce by weakening the brand equity of interstate beer brewers]), and as stated, California may regulate the business practices of one of its industries to maximize the return to that industry. (*Parker v. Brown, supra*, 317 U.S. 341 [87 L.Ed. 315].) Because section 25241 is designed to protect the economic interests of intrastate wineries from other intrastate wineries, application of section

25241 to Bronco, an intrastate winery will not disadvantage out-of-state economic interests in favor of intrastate economic interests. (Compare *Pike, supra*, 397 U.S. at p. 145 [25 L.Ed.2d at p. 180] [labeling regulation effectively required the closure of an out-of-state packing shed].)

Bronco has failed to establish the actual impact that section 25241 will have on interstate commerce. To that end, Bronco must show specific details as to how the costs of an enactment burden interstate commerce. (*S.D. Myers, Inc. v. City and County of San Francisco* (9th Cir. 2001) 253 F.3d 461, 471.) Because Bronco has presented no evidence to show the actual impact on its interstate sales, we are unable to effectively quantify the burden on interstate commerce. While Bronco may incur increased costs either to develop new brand names and brand equity for wine sourced outside of Napa County or increased costs to purchase Napa County grapes for use with its existing labels, the costs are offset by the fact Bronco also will incur them in connection with its intrastate sales, which Bronco does not contest. While compliance with section 25241 may cause consumer confusion caused by the sale of Bronco's wine under new brand names, the inconvenience to consumers will only be temporary.

We conclude that the state's interests in protecting the reputation and integrity of its vital wine industry from the use of misleading brand names outweighs the incidental effect on interstate and foreign commerce.

3. Lesser Alternatives

The last issue to consider is whether the state's interests could be promoted with a lesser impact on interstate commerce. (*Pike, supra*, 397 U.S. at p. 142 [25 L.Ed.2d at p. 178].) Bronco contends respondents have failed to show there are alternatives with a lesser impact on interstate commerce, while suggesting that any possible consumer confusion could be eliminated by gradually phasing in the

provisions of the legislation, requiring additional label disclosures, or engaging in additional advertising and promotion of Napa County appellations.

Bronco is in error because it is the petitioner, not respondent, who bears the burden of proof. As the party challenging the constitutional validity of section 25241, Bronco has the burden of proving that alternatives which it proposes are *equally effective* in eliminating the misleading and confusing nature of the brand names. (*Pacific Northwest Venison Producers v. Smitch*, *supra*, 20 F.3d at p. 1017; *Maine v. Taylor* (1986) 477 U.S. 131, 146-148 [91 L.Ed.2d 110, 126].)

Bronco has failed to meet this burden of proof. It has provided no example of such a label nor studies showing that a different label would be equally effective in dispelling consumer confusion. On the other hand, BATF officials have found that the brand name, which is usually the most prominent item on a wine label, conveys to the consumer the origin of the wine grapes. In 1986, the BATF determined that because the brand name is so prominent, placing additional disclosures on such a label would not effectively offset the misleading impression that could be caused by a brand name of geographic significance when the wine is not made with grapes from the geographic area named. (51 Fed. Reg., *supra*, at p. 20481.) By enacting section 25241, the California Legislature impliedly made the same finding and we may not second guess its empirical judgment. (*Pacific Northwest Venison Producers v. Smitch*, *supra*, 20 F.3d at p. 1017.)

Nor is there any evidence to show that phasing in section 25241 would be equally effective. To the contrary, delaying its application will allow Bronco to continue the very practice the Legislature has found misleading. Similarly, there is no evidence to show that an advertising campaign to promote Napa County appellations would have as broad or direct a reach as a change in Bronco's labels.

For the foregoing reasons we conclude that the state's interests in protecting California wine consumers from misleading brand names and preserving and maintaining the reputation and integrity of its wine industry as a result of the use of such brand names in out-of-state and foreign markets, outweigh the indirect and temporary effect of section 25241 on out-of-state wine consumers. Accordingly, we hold that section 25241 does not violate the commerce clause.

III.

Fifth Amendment Takings Clause

Bronco contends section 25241 constitutes an uncompensated "taking" in violation of the takings clause of the Fifth Amendment.

Bronco argues that section 25241 constitutes a total taking of its affected COLAs because it effectively nullifies the total value of the COLAs issued for any label bearing the Brands with an appellation of origin outside Napa County. The statute effects a taking of its Brands because it fails to further a legitimate state interest given the extensive federal regulatory scheme and the absence of actual deception.²⁷ It challenges the application of section 25241 to Bronco on the grounds it substantially deprives it of the economic value of its brand equity in these Brands.

Respondent and intervenors respond that COLAs are not property subject to the takings clause and section 25241 furthers legitimate state interests and restricts only one of the uses of Bronco's Brands. They also argue that Bronco's challenge is not ripe for review because no final decision has been issued against Bronco and it has failed to seek compensation by eminent domain proceedings.

²⁷ In *Lingle v. Chevron* (May 23, 2005, No. 04-163) U.S. ____ [2005 D.A.R. 5868], at page ____ [at p. 5872], the Supreme Court most recently held that the "substantially advances" formula is not a valid method of identifying regulatory takings under the Fifth Amendment.

We hold that section 25241 does not effect a taking of Bronco's COLAs because, standing alone, COLAs are not property subject to Fifth Amendment protection and the statute does not effect a taking of Bronco's brand equity under *Penn Central Transportation Company v. New York City* (1978) 438 U.S. 104, 122 [57 L.Ed.2d 631, 647] (*Penn Central*).²⁸

The takings clause of the Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation." It is applicable to the states through the Fourteenth Amendment. (*Chicago, B. & Q.R. Co. v. Chicago* (1897) 166 U.S. 226, 239 41 L.Ed.979, 986]; *Penn Central*, *supra*, 438 U.S. at p. 122 [57 L.Ed.2d at p. 647].) Its purpose is to prohibit "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Penn Central*, *supra*, at p. 123 [at p. 648], quoting *Armstrong v. United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561].) Although a taking often occurs when the government physically invades or confiscates property, the Supreme Court has long recognized that economic regulation may constitute a taking if it "goes too far." (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [67 L.Ed. 322, 326].)

The claimant must establish (1) it has a protectable property interest, (2) there has been a taking of the property, and (3) the taking was for a public purpose. (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1000-1001 [81 L.Ed.2d 815, 831]; *American Pelagic Fishing Co. v. United States* (Fed. Cir. 2004) 379 F.3d 1363, 1372 (*American Pelagic*); *Conti and Conti Corp. v. United States* (Fed. Cir. 2002) 291 F.3d 1334, 1339 (*Conti*).)

A. COLAs

²⁸ Because we so hold, we do not address Bronco's claim that the statute does not advance a legitimate state interest within the meaning of the public purpose requirement of the takings clause.

Bronco contends its COLAs constitute a definite "bundle of rights" that qualify as compensable property under the Fifth Amendment. Respondent and intervenor respond that a COLA is like a license or permit, which generally are not considered property within the meaning of the takings clause. We agree that, standing alone, COLAs are not property protected by the takings clause because a COLA constitutes but one strand in the bundle of rights possessed by the owner of a brand name.

The takings clause protects real property (*Lucas v. S. C. Coastal Council* (1992) 505 U.S. 1003, 1019 [120 L.Ed.2d 798, 815]), tangible personal property (*Andrus v. Allard* (1979) 444 U.S. 51, 65 [62 L.Ed.2d 210, 222] (*Andrus*)) and intangible property. (*Ruckelshaus v. Monsanto Co.*, *supra*, 467 U.S. at pp. 1003-1004 [81 L.Ed.2d at pp. 832-833] (trade secrets).) Whether something is protected property turns on the "existing rules and understandings" and "background principles" derived from an independent source, such as state, federal, or common law, [which] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." (*Conti*, *supra*, 291 F.3d at p. 1340, quoting *Lucas*, *supra*, 505 U.S. at p. 1030 [120 L.Ed.2d at p. 822].) Such property interests may derive from federal law (*Conti*, *supra*, 291 F.3d at pp. 1340-1341, and fn. 4) or state law. (*Lucas*, *supra*, 505 U.S. 1003 [120 L.Ed.2d 798].)

The right to exclude others, and to sell, assign or otherwise transfer ownership are traditional hallmarks of property. (*Ruckelshaus v. Monsanto Co.*, *supra*, 467 U.S. at p. 1002 [81 L.Ed.2d at p. 832]; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435-36 [73 L.Ed.2d 868, 882] (describing rights to dispose of property and to sell it as part of the owner's bundle of property rights in a thing).)

In determining whether permits or licenses are property, the courts consider whether the permit or license is transferable, the extent to which the government has the right

to regulate the underlying activity, or to revoke, suspend, or modify the permit or license, and whether there has been a legislative or regulatory expression that issuance of the permit does not create a property right. (*American Pelagic*, 379 F.3d at p. 1374; *Conti*, *supra*, 291 F.3d at pp. 1341-1342].)

Considering these hallmarks of property, the courts generally have found that licenses and permits do not constitute property rights for purposes of the takings clause. (See *American Pelagic*, *supra*, 379 F.3d at p. 1374 (fishing permit); *Federal Lands Legal Consortium v. United States* (10th Cir. 1999) 195 F.3d 1190, 1201 (grazing permit); *United States v. Fuller* (1973) 409 U.S. 488, 493 [35 L.Ed.2d 16, 22] (grazing permits); *Conti*, *supra*, 291 F.3d 1334, 1339 (fishing permit); *Acton v. United States* (9th Cir. 1968) 401 F.2d 896, 899 (uranium prospecting permit); *Burns Harbor Fish Co. v. Ralston* (S.D. Ind. 1992) 800 F.Supp. 722, 728 (fishing permit).) However, where a license bears the hallmarks of property, it has been held to be a protectable property right. (See *Jackson v. United States* (1952) 122 Ct.Cl. 197, 206 [103 F.Supp. 1019, 1020] (fishing license was alienable and conferred exclusive fishing rights))

In *Cabo Distributing Co., Inc. v. Brady* (N.D. Cal. 1992) 821 F.Supp. 601, at page 609, the court held that a COLA is a protected property interest for purposes of the due process clause, requiring procedural due process before it may be revoked. The court in *Hornell Brewing Co. v. Brady* (E.D.N.Y. 1993) 819 F.Supp. 1227 at page 1244, citing to *Cabo*, assumed without deciding that the COLA at issue was property for purposes of the takings clause. Similarly, in *Bronco Wine Co. v. United States Dept. of Treasury* (E.D. Cal. 1996) 997 F.Supp. 1309, 1316, the court stated in dicta that since a COLA is property for purposes of due process analysis, it must also qualify for Fifth Amendment protection.

Contrary to the assumption in *Bronco Wine Co. v. United States Dept. of Treasury*, *supra*, 997 F.Supp. at page 1316, the due process and takings clause concepts of property

are not coterminous. The due process clause recognizes a wider range of interests in property. (*Pro-Eco v. Bd. Of Commissioners* (7th Cir. 1995) 57 F.3d 505, 511-512; *Federal Lands Legal Consortium v. United States*, *supra*, 195 F.3d at p. 1197.)

As noted, a COLA is a certificate of label approval issued by the BATF that authorizes the bottling or packing of wine for introduction into interstate commerce under an approved label. (27 C.F.R. § 13.11 (2001).) The issuance, denial, and revocation of COLAs are governed by federal regulations. (27 C.F.R. § 13.1-13.92 (2002).) The regulations specify the information on the label, which identifies the wine and the bottling company, and informs consumers about the contents of the wine. (27 C.F.R. § 4.32 (1991); *Cabo Distributing Co. v. Brady*, *supra*, 821 F.Supp. at p. 609.) Wine may not be bottled, sold, or shipped in interstate commerce unless federal officials first issue a COLA. (27 C.F.R. §§ 4.30(a), 4.50(a) (2000).)²⁹ A winery which desires to use a particular label must submit an application that includes the complete set of the labels to be used. (27 C.F.R. §§ 13.11, 13.21 (2001).) The application and accompanying labels are reviewed by a BATF official, who must issue a COLA if the application "complies with applicable laws and regulations" (27 C.F.R. § 13.21(a) (2001).)

Although a COLA is issued for a potentially unlimited period of time, it may be revoked upon a finding the label or bottle is not in compliance with the applicable laws and regulations (27 C.F.R. § 13.41 (2001); see *Bronco Wine Co. v. United States Dept. of Treasury*, *supra*, 997 F.Supp. 1309) or by operation of law or regulation. (27 C.F.R. § 13.51 (2002).) If a COLA is revoked for lack of compliance, the holder is entitled to notice and a hearing. (27 C.F.R. §§ 13.42,

²⁹ By regulation, California also requires that the permittee responsible for labeling have a valid COLA obtained from the U.S. Treasury Department. (Cal. Code Regs., tit. 17, § 17075 (a).)

13.43 (2001); *Cabo Distributing Co., Inc. v. Brady*, *supra*, 821 F.Supp. at p. 609.) If a COLA is revoked by operation of law or regulation, no notice or hearing is required. The holder must voluntarily surrender its COLA. (27 C.F.R. § 13.51 (2002).)

According to the BATF, a COLA "was never intended to convey any type of proprietary interest to the certificate holder. On the contrary . . . [the COLA application] provides that 'This certificate is issued for ATF use only. This certificate does not constitute trademark protection.' . . . The certificate of label approval is a statutorily mandated tool used to help ATF in its enforcement of the labeling requirements of the FAA Act." (64 Fed. Reg. 2122, 2123 (Jan. 13, 1999).) As the California Supreme Court recently found in *Bronco Wine*, *supra*, COLAs do not confer "a 'right' on the holder to market wines in interstate or foreign commerce" (33 Cal.4th at p. 996.)

Thus, a COLA does not constitute property under the takings clause because wine labels are highly regulated, must be approved before wine is shipped in interstate or foreign commerce and serves only as an enforcement tool that may be revoked by BATF officials upon modification of BATF regulations.

Nevertheless, Bronco argues that COLAs are property because they grant exclusive rights, only the owner of a COLA may use an approved label on bottled wine, and they are alienable and assignable.

Bronco is correct that COLAs are exclusive and transferable. Indeed, as part of the purchase of the brand name "Napa Ridge," Bronco acquired the COLAs for the labels using that brand name. It is also true that a COLA has some of the aspects of property.

However, its use and value are inseparably linked to the brand name displayed on the label. A COLA is but one specific use of a brand-name. While a brand name has long

been considered protected property within the meaning of the takings clause (*Jacob Siegel Co. v. Federal Trade Commission* (1946) 327 U.S. 608, 612 [90 L.Ed. 888, 892]), a COLA is merely one "part of the entire bundle of rights possessed by the owner" of the brand name. (See *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 501 [94 L.Ed.2d 472, 498] (Keystone); *Andrus, supra*, 444 U.S. at p. 65 [62 L.Ed.2d at p. 222].) A COLA is assignable,³⁰ but only in connection with the sale of a brand name. Although a COLA confers exclusive rights to use a particular label, it does not authorize the exclusive use of a brand name. As Bronco notes, it is entitled to additional COLAs for its affected brand names and the three brand names at issue appear collectively on hundreds of COLAs issued over the years. Thus, no one COLA governs the use and value of a particular brand name.

Accordingly, a COLA is not entitled to protection under the takings clause apart from its connection and value to the brand name for which it is issued.

B. Brand Equity

Bronco contends section 25241 works a partial regulatory taking under *Penn Central* because it substantially deprives it of the value of its brand equity by pricing its Brands out of the market for value wines. We disagree.

1. Ripeness

Preliminarily, we dispense with the contention the claim is an as-applied challenge that is unripe for review because Bronco failed to obtain a final decision regarding its Brands and failed to seek compensation by inverse condemnation proceedings.

³⁰ By federal regulation, basic permits issued by the BATF for importers, producers, bottlers, and wholesalers of wine are not transferable. (27 C.F.R. § 1.20-1.22, 1.44 (1999).) The federal regulations impose no such restriction on COLAs.

While a facial challenge is generally ripe the moment the challenged regulation is passed (*Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10 [137 L.Ed.2d 980, 991]), a claimant making an as-applied claim must meet two requirements before seeking relief in federal court under the takings clause. It must establish that (1) the government entity charged with implementing the regulation has reached a final decision regarding how the property owner will be allowed to develop his property and (2) the property owner must "seek compensation through the procedures the State has provided for doing so." (*Williamson County Regional Planning Comm'n. v. Hamilton Bank* (1985) 473 U.S. 172, 186, 194 [87 L.Ed.2d 126, 139, 143].)

Generally the ripeness issue arises in land use takings cases where the property owner has failed to submit a revised plan that might be approved by regulators. (*Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264, 275 [69 L.Ed.2d 1, 15]; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, *supra*, 473 U.S. at p. 186 [87 L.Ed.2d at p. 141]; *Penn Central*, *supra*, 438 U.S. at pp. 136-137 [57 L.Ed.2d at p. 656].) The final decision requirement informs the court of "the nature and extent of [the] permitted development" before it adjudicates the constitutionality of the regulation. (*Lucas*, *supra*, 505 U.S. at p. 1011 [120 L.Ed.2d at p. 810].)

Neither requirement applies in this case. Although the parties characterize Bronco's challenge as an as-applied challenge, it is more in the nature of a pre-enforcement facial challenge to section 25241 because Bronco claims the mere enactment of the statute operates as a taking of its brand equity. (See *Keystone*, *supra*, 480 U.S. at pp. 494-495 [94 L.Ed.2d at pp. 494-495].) The final decision requirement is inapplicable because, unlike many land use regulations that authorize variances, section 25241 provides no discretionary exceptions to its enforcement (see *Lucas*, *supra*, 505 U.S. at p. 1011 [120 L.Ed.2d at p. 809]), and the enforcing agency

has advised Bronco by letter that if Bronco continues to use its brand names in violation of section 25241, the agency will enforce the statute.

Nor must Bronco exhaust a state remedy. The rule applies to limit federal court jurisdiction to hear premature takings claims. (*Williamson County Regional Planning Comrn'n. v. Hamilton, supra*, 473 U.S. at pp. 194-195 [87 L.Ed.2d at p. 144].) Here, Bronco has invoked our original jurisdiction (Cal Const., art VI, § 10), seeking injunctive and declaratory relief. At issue is the constitutional validity of the statute, not the amount owed under the takings clause. We therefore address the merits of Bronco's claim.

2. The Merits

The Supreme Court has employed a two-tiered framework for the analysis of a takings claim. A categorical analysis is used when there has been a physical invasion or appropriation of the property (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 322 [152 L.Ed.2d 517, 540] or a regulatory taking of all economically beneficial uses of the property. (*Lucas, supra*, 505 U.S. at p. 1015 [120 L.Ed.2d at p. 812]; *Lingle v. Chevron, supra*, __ U.S. at p. __ [2005 D.A.R. at p. 5871].) An ad hoc factual inquiry is made for regulatory action that diminishes but does not destroy the value of property by restricting its use. (*Ruckelshaus v. Monsanto Co., supra*, 467 U.S. at p. 1005 [81 L.Ed.2d at p. 834]; *Penn Central, supra*, 438 U.S. at p. 124 [57 L.Ed.2d at p. 648]; *Andrus, supra*, 444 U.S. at pp. 65-66 [62 L.Ed.2d at p. 223].) The court has identified three factors of significance. "Primary among those factors are 'the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' [Citation.] In addition, the 'character of the governmental action' -- for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and

burdens of economic life to promote the common good' -- may be relevant in discerning whether a taking has occurred." (*Lingle v. Chevron, supra*, U.S. at p. ____ [2005 D.A.R. at p. 5871]; (*Penn Central, supra*, 438 U.S. at p. 124 [57 L.Ed.2d at p. 648]; *Keystone, supra*, 480 U.S. at p. 495 [94 L.Ed.2d at p. 494].) The court may dispose of a takings claim on the basis of one or two of these factors. (*Maritrans Inc. v. United States* (Fed. Cir. 2003) 342 F.3d 1344, 1359 (where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations); *Ruckelshaus v. Monsanto Co., supra*, 467 U.S. at p. 1005 [81 L.Ed.2d at p. 834] (disposing of takings claim relating to trade secrets on absence of reasonable investment-backed expectations); see also *Andrus, supra*, 444 U.S. at pp. 65-68 [62 L.Ed.2d at pp. 222-224].)

In considering the character of the governmental action, the court has said that a taking more readily may be found when the interference with property is characterized as a physical invasion by the government rather than when it arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central, supra*, 438 U.S. at p. 124 [57 L.Ed.2d at p. 648].) "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." (*Keystone, supra*, 480 U.S. at pp. 491-492 [94 L.Ed.2d at p. 492].) Legislation prohibiting a particular use will be upheld as a valid exercise of the police power where it promotes "the health, safety, morals, or general welfare" (*Penn Central, supra*, 438 U.S. at p. 125 [57 L.Ed.2d at p. 649].)

Pertinent to the present case, the state has traditionally exercised its police power to protect the safety and integrity of its produce (*Florida Lime & Avocado Growers v. Paul* (1963) 373 U.S. 132, 146 [10 L.Ed.2d 248, 259]) and to protect consumers from fraudulent or otherwise harmful

business practices. (*CTS Corp. v. Dynamics Corp. of America, supra*, 481 U.S. at p. 92 [95 L.Ed.2d at p. 87]; *A.S. Goldenm & Co. v. New Jersey Bureau of Securities, supra*, 163 F.3d at p. 788; *Diamond Multimedia Systems, Inc. v. Supreme Court, supra*, 19 Cal.4th at p. 1064.)

Here, the nature of the governmental action does not entail the physical confiscation of Bronco's property. Section 25241 applies uniformly to prohibit the use of a brand name that is misleading to consumers and threatens to undermine the valuable reputation of California's premier wine growing region. In so doing, the Legislature has engaged in an exercise of its police power.

We will not reweigh the evidence relied on by the Legislature (*Maritrans v. United States, supra*, 342 F.3d at p. 1357) nor will we engage in a "least restrictive alternative" analysis, nor consider the fact the regulation is somewhat overinclusive or underinclusive. (*Keystone, supra*, 480 U.S. at p. 487, fn. 16 [94 L.Ed.2d at p. 489].)

When considering the economic impact of a regulatory statute we must consider the property in the aggregate. (*Keystone, supra*, 480 U.S. at p. 497 [94 L.Ed.2d at p. 496]; *Andrus, supra*, 444 U.S. at pp. 65-66 [62 L.Ed.2d at p. 223]; *Penn Central, supra*, 438 U.S. at pp. 130-131 [57 L.Ed.2d at p. 652].) A valid exercise of the police power does not constitute a taking when the regulation only diminishes rather than eliminates property value (*Penn Central, supra*, 438 U.S. at p. 131 [57 L.Ed.2d at pp. 652-653]; *Andrus, supra*, 444 U.S. at p. 66 [62 L.Ed.2d at p. 223]), or prohibits the property's most beneficial use. (*Andrus, supra*, 444 U.S. at pp. 65-66 [62 L.Ed.2d at p. 223]; (*Maritrans Inc. v. United States, supra*, 342 F.3d at pp. 1356-1359 [restriction on use of single hull tank barge on navigable waters is not a taking]; *Conti, supra*, 291 F.3d at pp. 1343-1344 [ban on the use of draft gillnet swordfishing is not a taking of vessel, gillnets, and related gear].)

In *Andrus, supra*, 444 U.S. 51 [62 L.Ed.2d 210], Congress passed two environmental acts designed to prevent the destruction of a species of birds by prohibiting the taking, possessing, buying, or selling of a bird, dead or alive, whole, or in part. The Secretary of the Interior promulgated regulations prohibiting the commercial transaction in parts of birds legally killed before the birds were protected by the acts. Appellees, in the business of trading Indian artifacts that included the feathers of protected birds, brought suit for declaratory and injunctive relief alleging the regulations constituted a taking. The Supreme Court disagreed, saying "a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. [Citations.] In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." (*Id.* at pp. 65-66 [62 L.Ed.2d at pp. 222-223].)

The court in *Andrus* also rejected the argument the regulations effected a taking because they prevented the most profitable use of the property. "[L]oss of future profits--unaccompanied by any physical property restriction--provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." (444 U.S. at p. 66 [62 L.Ed.2d at p. 223].)

Andrus is dispositive. Section 25241 does not effect a taking of Bronco's brand equity. It does not bar Bronco from using its Brands under all circumstances nor has Bronco established the statute has destroyed the substantial economic

value of its Brands. Bronco may use its Brands for wine made with grapes grown in the geographic area named and may continue to sell its value wine under brand names that are not geographically misleading.

As we have stated, Bronco's right to use its Brands, as authorized by its COLAs, is merely one of the rights in the bundle of rights it possesses. Bronco concedes that much. It claims however, that it will lose some of its market share which, in turn, will reduce its profits to some unknown degree. The argument does not succeed. The possibility that Bronco's future profits may be diminished does not entitle it to "just compensation" under the Fifth Amendment. (*Andrus, supra*, 444 U.S. at p. 66 [62 L.Ed.2d at p. 223].)

For the foregoing reasons we hold that section 25241 does not effect a taking of Bronco's COLAs or its brand equity in the Brands.

DISPOSITION

The petition for writ of mandate seeking to enjoin respondents from enforcing section 25241 with respect to wine that bears petitioners' federally approved labels is denied and the alternative writ is discharged. All parties shall bear their own costs in this proceeding. (Cal. Rules of Court, rule 56(1)(2).)

BLEASE, Acting P. J.

We concur:

RAYE, J.

MORRISON, J.

APPENDIX C

128 Cal. Rptr. 2d 320

Court of Appeal, Third District, California.

BRONCO WINE COMPANY et al., Petitioners,

v.

Manuel R. ESPINOZA, as Interim Director, etc., et al.,

Respondents;

- Napa Valley Vintners Association, Intervenors.

No. C037254.

Dec. 18, 2002.

As Modified on Denial of Rehearing Jan. 16, 2003.

Review Granted April 16, 2003.

Bill Lockyer, Attorney General, David S. Chaney, Senior Assistant Attorney General, Damon M. Connolly, Miguel A. Neri, Supervising Deputy Attorneys General, Terry Senne, Deputy Attorney General, for Respondents.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr. and Steven L. Mayer, San Francisco; Ropes & Gray, Peter M. Brody and Kelly B. Kramer, Washington, Dist. of Columbia, for Petitioners.

Keker & Van Nest, John W. Keker, Henry C. Bunsow, James M. Emery, Ragesh K. Tangri, San Francisco, and Daniel Purcell, for Intervenor.

BLEASE, Acting P.J.

This proceeding arises out of an original petition for writ of mandamus filed in this court by stipulation of the

parties.¹ Petitioners, Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (hereafter Bronco), seek a writ of mandate prohibiting respondents Department of Alcoholic Beverage Control and Manuel R. Espinoza, the Interim Director of that Department, from enforcing Business and Professions Code Section 25241,² with respect to wines bearing Bronco's federally approved labels. Intervenor Napa Valley Vintners Association (Intervenor) joins with respondents. We issued an alternative writ and pursuant to the parties' consent, granted a stay of enforcement of section 25241.

At issue are the brand names that appear on labels of Bronco wine. A brand name is distinguished from an appellation of origin, which states the origin of the grapes used in making the wine. Section 25241 proscribes the use of a brand name on "wine produced, bottled, labeled, offered for sale or sold in California . . . on any label, packaging material, or advertising," that uses the word "Napa" or the name of any federally recognized sub-appellation located entirely within Napa County, or any "similar name . . . that is likely to cause confusion as to the origin of the wine," unless the wine qualifies under federal law for the appellation of origin Napa County and the appellation of origin is specified on the label, packaging material, or advertising. Section 25241 thus ties the requirements for a brand name to the federal requirement for an appellation of origin, that a specified percentage of the grapes contained in the bottle must come from the viticultural

¹ Business and Professions Code section 23090.5 divests the Superior Court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing Business and Professions Code section 25241. The respondents have stipulated that jurisdiction to issue a writ of mandate lies with this court. Intervenor filed a pleading challenging our subject matter jurisdiction but made no supporting argument. It has therefore waived the issue.

² All further references to a section are to the Business and Professions Code unless otherwise designated or implied from the context.

area suggested by the appellation.

Section 25241 prohibits the use of the brand names Napa Ridge, Rutherford Vintners, and Napa Creek Winery on the Bronco labels because the grapes used in producing the wines did not come from Napa County although the labels on these wines include a correct appellation of origin below the brand name disclosing the place where the grapes used to produce the wine were grown.

Bronco challenges the constitutionality of section 25241 as applied to its federally approved wine labels, contending that, as to wine destined for sale in interstate and foreign commerce, the statute is preempted by federal law.³ The respondents do not challenge the validity of Bronco's federal labels, the certificates of label approval which grant Bronco the right to place the challenged brand names on its wine, or the federal regulations pursuant to which the labels were authorized.⁴ Rather, respondents claim the state and federal laws share the same purpose and therefore state law is not preempted because it does not stand as an obstacle to fulfillment of the purpose of the federal statute. Intervenor Napa Valley Vintners Association claims the federal scheme

³ Because we resolve the case on grounds of preemption, we need not address Bronco's contentions that section 25241 violates the First Amendment and the Commerce and Takings clauses of the United States Constitution.

⁴ Respondents contend the conflicting federal regulation at issue in these proceedings (27 C.F.R. § 4.39(i)(2)(ii) (2002)), is not supported by any factual findings that labels exempted by the provision are less likely to mislead consumers. This is a challenge of sort to the regulation. Nevertheless, respondents make clear in their return that they "are not challenging the lawfulness of the BATF regulations in this case" and frame "the issue for this Court [as] simply whether the BATF's grandfathering provision—which Respondents assume is valid federal law—establishes a minimum standard for wine labels or a maximum limitation on state regulation." We therefore assume the validity of the regulations and address the issue tendered by respondents.

contemplates concurrent regulation which leaves the states free to impose greater restrictions in order to achieve a common end. We disagree with both claims.

The federal law sets forth a complete system for the regulation of the interstate sale of wine. It requires that such wine bear a federal label pursuant to a certificate of approval. The federal law governs the content of both appellations of origin and brand names on the label. It permits the concurrent state regulation of appellations of origin but not of brand names. Bronco's federal right to use its brand names in interstate commerce stems from compliance with a grandfather clause in this law which requires that its labels show the appellation of origin.

Accordingly, we shall conclude that, as applied to the labels on bottled wine destined for shipment into interstate and foreign commerce, section 25241 is preempted by federal regulations and federal certificates of label approval since section 25241 prohibits precisely that which the federal law permits. We further find that, because the application of section 25241 to interstate and foreign commerce is not severable from its intra state application, section 25241 is void in its entirety.

We will grant a peremptory writ of mandate directing respondents not to enforce Business and Professions Code section 25241.⁵

⁵ Respondents' motion for judicial notice of petitioner's complaint in *Bronco Wine Company v. United States Department of the Treasury et al.*, 997 F.Supp. 1309 (E.D.Cal.1996) is denied as immaterial to the issue in this case. (Evid.Code, § 452, subd. (d).)

Intervenor's motion for judicial notice of documents relating to (1) the federal criminal prosecution against Bronco and its owner; (2) Bronco's suit against the BATF regarding the seizure of Rutherford Vintner's wine; and (3) the ensuing BATF action to revoke Bronco's operating permit is also denied as immaterial to a resolution of the issue in this case.

Factual and Procedural Background

Except as noted, the relevant facts are not in dispute.

Bronco Wine Company is a winery specializing in, according to Bronco, "premium wines at affordable prices." Barrel Ten Quarter Circle, Inc. (Barrel Ten), is a separate company although ownership and management of the two companies overlap.

Some of Bronco's wine is bottled at its wineries in Ceres and Sonoma County; other Bronco wines are bottled under contract by petitioner Barrel Ten at a recently completed winery in Napa, California.

Bronco's wines are bottled under a variety of labels. All of their labels have been reviewed and approved by federal regulators and have been issued federal certificates of label approval permitting their use in interstate commerce. Bronco sells its wine under a number of brand names, including the brand names "Napa Ridge," "Rutherford Vintners" and "Napa Creek Winery." Each of the labels lists the source of the grapes by the appellation of origin set forth below the brand name.⁶

⁶ The labels are divided in the record into sections for each of the three brand names. The labels selected for display here are the first from each section.



Bronco acquired these three brand names, and the labels on which they appeared, from predecessor owners. The brand name "Napa Creek Winery," introduced in 1981, was acquired by Bronco in 1993. "Rutherford Vintners," which originated in the early 1970s, was acquired by Bronco in 1994. "Napa Ridge," which Bronco acquired in January 2000 from Beringer Wine Estates, has been in trade since the early 1980s.

Bronco and its predecessors-in-interest have used these brand names with wines from a variety of appellation areas in California, both before and after Bronco's acquisition of the brands. Beringer, the prior owner of "Napa Ridge," obtained label approvals for use of "Napa Ridge," and used that brand name with wines made from grapes grown in the Central Coast, North Coast, and Lodi appellation areas, as well as from the Napa Valley appellation. The labels on these wines included a correct appellation of origin disclosing the place where the grapes used to produce the wine were grown.

Bronco invested significant sums of money when it acquired, promoted, and advertised the "Napa Ridge," "Rutherford Vintners" and "Napa Creek Winery" labels and brand names. Bronco's annual sales of wines under labels bearing these three brand names collectively amount to approximately 300,000 cases, representing annual gross revenues of approximately \$17 million. Of this amount,

approximately 28 percent are attributable to sales within California and approximately 72 percent are attributable to sales outside California.

Pursuant to an inquiry by Bronco, the Department of Alcoholic Beverage Control advised Bronco by letter, dated December 1, 2000, that it intended "to enforce Section 25241 pursuant to its terms" It further advised Bronco that if it continued to use its labels in violation of section 25241, "the Department may take disciplinary action against the license of Bronco Wine Company, up to and including revocation of [Bronco's] license."

On December 22, 2000, Bronco filed the present original petition for writ of mandate in this court prohibiting enforcement of section 25241. Respondents and intervenor filed briefs in opposition. We granted an alternative writ and issued a stay of enforcement pursuant to the consent of the parties.

Discussion

I

Preemption

Bronco contends that, as applied to wines sold in interstate and foreign commerce, section 25241 is preempted by federal law because it conflicts with federal regulations and federal certificates of label approval and therefore stands as a complete obstacle to the accomplishment of the federal statutory and regulatory scheme.

The respondents do not challenge the validity of Bronco's federal labels nor the regulations pursuant to which they were issued. They contend there is no conflict between the federal regulations and section 25241 because state and federal law share the same purpose and therefore state law does not stand as an obstacle to fulfillment of the purpose of

the federal statute. Intervenor argues the federal scheme contemplates concurrent regulation which leaves the states free to impose greater restrictions in order to achieve a common end. We disagree with each of these claims.

We first consider the statutory and regulatory schemes.

A. The Statutory and Regulatory Background

Subdivision (b) of Section 25241 states the following prohibition:

“(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.⁷

⁷ Section 25240 states:

“Any wine labeled with a viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of the Code of Federal Regulations, other than the viticultural area ‘Napa Valley,’ and which is located entirely within a county of the 29th class, shall bear the designation ‘Napa Valley’ on the label in direct conjunction therewith in a type size not smaller than 1mm less than that of the viticultural area designation provided neither designation is smaller than 2mm on containers of more than 187ml or smaller than 1mm on containers of 187ml or less. This requirement shall apply to all wines bottled on or after January 1, 1990. “The department may suspend or revoke the license of any person who violates this section.”

"Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations."⁸

This subdivision prohibits the use of the word "Napa" or the name of any recognized viticultural area⁹ contained

⁸ The remaining substantive provisions of section 25241 are as follows:

"(c) The following are names of viticultural significance for purposes of this section:

"(1) Napa.

"(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of the Code of Federal Regulations that is located entirely within Napa County.

"(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

"(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

"(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

"(f) The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

"(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001."

⁹ A viticultural area is a grape growing region defined by federal law. (27

entirely within Napa County, or any similar brand name that is likely to cause confusion as to the origin of the wine, on a wine label unless the wine meets the federal standards for an appellation of origin for the grape growing region suggested by the brand name. The federal standards generally require that a certain percentage of the wine contained in the bottle be derived from grapes grown within the designated appellation area. (See 27 C.F.R. § 4.25a (2002).)

The purpose of section 25241, as stated in the legislative findings, is to protect the reputation of Napa Valley wines and eliminate consumer deception resulting from the misleading use of brand names of viticultural significance in the labeling and advertising of bottled wine. (§ 25241, subd. (a).)¹⁰ As respondents point out, and the legislative history demonstrates, section 25241 was enacted to close a perceived loophole in the existing federal regulatory scheme which allowed producers like petitioner Bronco to sell wines produced with grapes from areas other than Napa

C.F.R. §§ 4.25a(e) and 9.1-9.173 (2002).)

¹⁰ Section 25241 states the Legislature's findings as follows:

"(a)(1) The Legislature finds and declares that for more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County.

"(2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices.

"(3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin."

while using brand names suggesting the wine is sourced with Napa grapes. As we next show, there is no loophole. The federal scheme expressly authorizes Bronco to deliver, sell or introduce its wine into interstate commerce with the approved labels prohibited by section 25241.

Soon after the repeal of prohibition, Congress enacted the Federal Alcohol Administration Act (27 U.S.C. § 201 et seq.)(hereafter FAAA) which established national rules for the distribution, production, and importation of alcoholic beverages in interstate commerce. (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 480, 115 S.Ct. 1585, 1588, 131 L.Ed.2d 532, 537.)

The FAAA completely governs the interstate sale of wine. It makes it unlawful “[t]o sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce” wine unless it is “bottled, packaged, and labeled in conformity with ... regulations, to be prescribed by the [federal] Secretary of the Treasury” Accordingly, if a wine meets the federal requirements the producer has a right to sell it in interstate or foreign commerce. (27 U.S.C. § 205(e).)¹¹

¹¹ 27 United States Code section 205(e), provides in pertinent part:

“It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer ...:

(e) “Labeling. To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as

to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: Provided, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 19, 1935; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: Provided further, That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent and Trademark Office which has been used by such person or predecessors in the United States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

The FAAA grants broad discretion to the Department of Treasury to fashion a regulatory scheme designed to protect consumers from false, misleading, or inaccurate labels and to protect competitors from unfair business practices. (*Arrow Distilleries, Inc. v. Alexander* (7th Cir.1940) 109 F.2d 397, 402, cert. denied, 310 U.S. 646, 60 S.Ct. 1095, 84 L.Ed. 1412; *Continental Distilling Corporation v. Shultz* (D.C.Cir.1972) 472 F.2d 1367, 1370-1371; *Taylor Wine Co., Inc. v. Department of the Treasury* (1981) 509 F.Supp. 792, 793-794.) The Treasury, through the Bureau of Alcohol, Tobacco, and Firearms (hereafter the BATF) has promulgated extensive regulations implementing section 205 as applied to wine. (See 27 C.F.R. Pts. 1, 4, 9, 12, 13, 16 (2002).)

The regulations establish a program that governs the procedure for the issuance, denial, and revocation of certificate of label approval (COLA). (27 C.F.R. §§ 13.1-13.92 (2002).) Wine may not be sold or shipped in interstate commerce unless federal officials first issue a COLA and the "wine is packaged, and ... marked, branded, and labeled in conformity" with the regulations. (27 C.F.R. §§ 4.30, 4.50 (2002).)¹² A winery desiring to use a particular label must submit an application that includes the complete set of labels to be used. (27 C.F.R. §§ 13.11 and 13.21 (2002).) The application and accompanying labels are reviewed by a BATF official, who must issue a COLA if the application "complies with applicable laws and regulations . . ." (27 C.F.R. § 13.21(a) (2002).) The holder of a COLA is known as a "permittee." (27 C.F.R. § 13.11 (2002).)

¹² By regulation, California requires that the permittee responsible for labeling have a valid COLA obtained from the United States Treasury Department. (Cal.Code Regs., tit. 17, § 17075, subd. (a).) California has adopted regulations that make the federal regulations "applicable to all the wine produced, imported, bottled, offered for sale or sold within the state for beverage use," to the extent not otherwise specified or excepted. (Cal.Code Regs., tit. 17, § 17001, subd. (a).) The federal regulations governing definitions and standards of identity and quality for wine also are made applicable in California. (Id., § 17001, subd. (b).)

If the application is denied, the applicant has a right to appeal the decision. (27 C.F.R. §§ 13.25-13.27 (2002).) Once issued, a COLA is valid until revoked by the Chief of the Alcohol and Tobacco Programs Division upon a finding the label is not in compliance with the applicable laws and regulations. (27 C.F.R. § 13.41 (2002).)¹³

An application for a COLA must comply with the BATF's regulations on labeling. (27 C.F.R. §§ 4.1, 4.30(a) (2002).) A wine label is required to contain specified information including a brand name, the class or type of wine, the alcohol content, the name and address of the bottler, and the federal health warning for alcoholic beverages. (27 C.F.R. §§ 4.30(a), 4.32, 4.33(a), 16.21 (2002)).

Generally, the regulations allow, but do not require, a wine label to specify the geographical area where the grapes used to produce the wine are grown. Such a specification is referred to as an appellation of origin. (See 27 C.F.R. § 4.25a (2002).) An appellation of American wine is the United States, a state, a combination of two or three states or counties, a county which must be identified as such, or a viticultural area. (27 C.F.R. § 4.25a (a)(1)(2002).) A viticultural area is defined as "[a] delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9" (27 C.F.R. §§ 4.25a (e)(1)(i) and 9.1-9.173 (2002).) American Viticultural Areas (hereafter AVA) are recognized and defined by regulation. (27 C.F.R. §§ 9.1-9.173 (2002).)

¹³ Prior to revocation, the permittee receives notice and is given the opportunity to be heard. (27 C.F.R. §§ 13.42 and 13.43 (2002).) A decision to revoke a COLA may also be appealed within the BATF and then in the federal courts. (27 C.F.R. § 13.44 (2002).) A COLA is also subject to revocation by operation of law or regulation in the event the governing law or regulation has changed a labeling or other requirement. (27 C.F.R. § 13.51 (2002).)

Examples of recognized AVAs include the Napa Valley (27 C.F.R. § 9.23 (2002)), and areas wholly contained within the Napa Valley, such as Rutherford (27 C.F.R. § 9.133 (2002)), Stags Leap District (27 C.F.R. § 9.117 (2002)), Oakville (27 C.F.R. § 9.134 (2002)), St. Helena (27 C.F.R. § 9.149 (2002)), and Yountville (27 C.F.R. § 9.160 (2002)).

In order to use an appellation of origin, other than an AVA, on a wine label, at least 75 percent of the wine must be derived from grapes grown in the area indicated by the appellation, must be fully finished in the named appellation area, and must "conform[] to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place." (27 C.F.R. § 4.25a (b)(1)(iii) (2002).)

By contrast, to use an AVA on a wine label, the AVA must be approved under Part 9 of the regulations, 85 percent of the wine must be derived from grapes grown within the AVA, and the wine must be fully finished within the state within which the labeled AVA is located. (27 C.F.R. § 4.25a (e)(3)(2002).)

Generally, the regulations prohibit any statement on a label "that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression." (27 C.F.R. § 4.39(a)(1)(2002).) The regulations broadly prohibit misleading brand names. (27 C.F.R. § 4.33(b) (2002).)

B. The Grandfather Clause

The regulations generally prohibit the use of a brand name of viticultural significance "unless the wine meets the appellation of origin requirements for the geographic area

named.” (27 C.F.R. § 4.39(i)(1)(2002).) However, this limitation on the use of brand names of viticultural significance does not apply to brand names that were approved and in use prior to July 7, 1986. (27 C.F.R. § 4.39(i)(2) (2002).) It is the legal effect of this exception that is the subject of these proceedings.

Part 4.39(i) (2002) provides in pertinent part as follows:

“ § 4.39 Prohibited practices.

“

“(i) *Geographic brand names.*

“(1)

“(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:

“(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

“(ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either:¹⁴

“(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;

“(B) A state, county or a viticultural area, if the brand name bears a state name; or

“(iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

“(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural

¹⁴ 27 Code of Federal Regulations section 4.34(b) (2002) requires that the appellation of origin “appear in direct conjunction with and in lettering substantially as conspicuous as the class and type designation”

significance by the appropriate ATF officer."

This part, which we shall refer to as the "grandfather clause," allows the holder of a COLA issued prior to July 7, 1986, to use an AVA such as Napa Valley or Rutherford, for example, in a brand name, without meeting the requirement that 85 percent of the wine be derived from grapes grown in the respective AVA of Napa Valley or Rutherford, if the holder of the COLA satisfies either one of three tests: (1) the test for new brand names, that the wine meet the appellation of origin requirements for the geographic area named (27 C.F.R. § 4.39(i)(2)(i)(2002); (2) the wine is labeled with an appellation of origin (27 C.F.R. § 4.39(i)(2)(ii)(2002)), or (3) the wine is labeled with a statement which the Director finds sufficient to dispel the impression that the brand name is suggestive of the appellation of origin. (27 § 4.39(i)(2)(iii) (2002).)

The first test permits what the respondents and intervenor seek, compliance with the California law. However, there is a second test which Bronco meets.

The effect of the second test (27 C.F.R. § 4.39(i)(2)(ii) (2002)) is to authorize the use of a geographic brand name for wine that is not produced with grapes from the named geographic area if the wine is labeled with an appellation of origin. For example, the brand name "Rutherford Vintners" may be used even though 85 percent of the wine is not produced with grapes grown in Rutherford, as long as the label specifies the appellation of origin, which may be Lodi or Stanislaus County.

The critical point in this action is that section 25241 prohibits the use of brand names in these circumstances. It prohibits the use of brand names on wine labels that are permitted by federal law and renders useless the federal COLAs issued for those labels.

C. Analysis

We first consider the parameters of the question before us. Because section 25241 applies to all wines produced, bottled, labeled, offered for sale or sold in California, it applies to wines sold in this state as well as to wine sold in interstate and foreign commerce. Bronco challenges the constitutional validity of section 25241 only as it applies to the sale of wine in interstate and foreign commerce. As we later show, Bronco, as authorized by state law, sells its wine to a distributor located in California for subsequent sale in interstate and foreign commerce.

Thus, the question presented by the parties is whether California may bar the use of labels on bottled wine destined for export into interstate and foreign commerce, when those labels have been granted federal certificates of label approval pursuant to regulations that authorize what state law prohibits.

1. Federal Preemption Law

Under the Supremacy Clause of the United States Constitution, federal statutes and regulations preempt conflicting state law. (U.S. Const., art. VI, cl. 2; *See Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372, 120 S.Ct. 2288, 2293, 147 L.Ed.2d 352, 361.) In determining whether federal law preempts state law, the court's task is to determine congressional intent. (*English v. General Electric Co.* (1990) 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65, 74; *Northwest Cent. Pipeline v. Kan. Corp. Comm'n* (1989) 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509, 527.) That intent may be express or implied. It is express when Congress explicitly states it is preempting state authority. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 614.) It is implied when (1) it is clear that Congress intended, by

comprehensive legislation, to occupy the entire field of regulation leaving no room for the States to supplement federal law. (See *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447), (2) where the state law directly conflicts with federal law because compliance with federal and state regulations is a physical impossibility (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248, 257), or (3) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587; *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580, 588-589; *Barnett Bank of Marion Cty, N.A. v. Nelson* (1996) 517 U.S. 25, 31-32, 116 S.Ct. 1103, 1107-1108, 134 L.Ed.2d 237, 244-245.) What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. (*Crosby v. National Foreign Trade Council, supra*, 530 U.S. at p. 373, 120 S.Ct. at p. 2294, 147 L.Ed.2d at p. 361.)

Respondents contend there is a strong presumption against federal preemption of state legislation, where as here, Congress has legislated to prevent consumer deception, an area traditionally occupied by the states. (*California v. ARC America Corp.* (1989) 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86, 94; *United States v. Locke* (2000) 529 U.S. 89, 108, 120 S.Ct. 1135, 1147, 146 L.Ed.2d 69, 89; See *Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at p. 230, 67 S.Ct. at p. 1152, 91 L.Ed. at p. 1459; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179, 188; *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, 373 U.S. at p. 146, 83 S.Ct. at p. 1219, 10 L.Ed.2d at p. 259.) We disagree.

"So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action--and the

validation of congressionally authorized state or local action--flow directly from the substantive source of whatever power Congress is exercising, coupled with the Supremacy Clause of Article VI; cases implicating this principle may pose complex questions of statutory construction but raise no controversial issues of power." (Tribe, *American Constitutional Law* (3d ed.2000) § 6-28, p. 1172, fn. omitted.)

Bronco only challenges the validity of section 25241 as it applies to wine destined for interstate and foreign commerce. Congress has enacted legislation regulating the labeling of wine introduced into interstate and foreign commerce. Its authority to do so flows from its power under the commerce clause. Thus, the State's effort to prohibit the sale and shipment of bottled wine destined for interstate and foreign commerce by regulating the manner in which those bottles are labeled is preempted where that manner directly conflicts with federal law which fully regulates the manner in which wine shipped in interstate and foreign commerce is labeled. (*McDermott v. Wisconsin* (1913) 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754.)

In *McDermott, supra*, the Supreme Court struck down a Wisconsin statute which prohibited the sale of cans of a mixture of glucose and refiners' syrup unless it met specified content (glucose in a proportion exceeding 75 percent by weight) and labeling requirements ("Glucose flavored with Maple Syrup," "Glucose flavored with Sugar-cane Syrup," "Glucose flavored with Refiners' Syrup,"). The plaintiff, a Wisconsin retail merchant, purchased cans of the mixture from a wholesale merchant in Chicago and placed those cans on its own shelves for resale. The cans bore labels which did not meet the standards specified under Wisconsin law but were in accordance with the federal food and drugs act and had been expressly approved by federal regulators pursuant to that act. The federal act prohibited the introduction into interstate commerce any article of food or drugs which was

adulterated or misbranded. The federal statute defined the terms "adulterated" and "misbranded", setting forth the requirements for labeling in compliance with federal law. (228 U.S. at pp. 126-127, 33 S.Ct. at pp. 432-433, 57 L.Ed. at pp. 763-764.)

First addressing the power of Congress to regulate in this area, the high court found the purpose of the federal statute is to prevent the misuse of the facilities of interstate commerce by protecting consumers from deceptive branding and adulterated food and drugs. That purpose is met when the federally approved labels are on the articles of food or medicine when they reach the consumer. Thus, the court concluded the requirements of the act were clearly within the power of Congress over interstate commerce. (228 U.S. at pp. 128-129, 33 S.Ct. at pp. 433-434, 57 L.Ed. at pp. 764-765.)

The court then found that while the state is permitted to regulate with "a view to the protection of its people against fraud or imposition by impure food or drugs it is equally well settled that the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution." (*Id.* at pp. 131-132, 33 S.Ct. at pp. 434-435, 57 L.Ed. at p. 766.) The court reasoned that to permit Wisconsin to regulate in the manner it chose, "is to permit a state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of

Congress over the subject.” (*Id.* at pp. 133-134, 33 S.Ct. at pp. 435-436, 57 L.Ed. at pp. 766-767.) The court therefore concluded that to require the removal or destruction of the federally approved labels before the goods are sold is beyond the power of the state. “The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.” (*Id.* at pp. 134, 33 S.Ct. at p. 436, 57 L.Ed. at pp. 767.)

Similarly, the federal statutory and regulatory scheme before us provide a comprehensive means to protect consumers against deceptive labeling on bottled wine. That scheme prohibits the sale or shipment of wine in interstate and foreign commerce unless federal officials have issued a COLA and the wine is packaged, labeled, and branded in conformity with federal law. (27 C.F.R. §§ 4.30, 4.50 (2002).) The use of misleading brand names on labels is prohibited (27 C.F.R. § 4.33(b)(2002)) and the issuance of a COLA is certification by federal officials that the label complies with federal law. (27 C.F.R. § 13.21(a) (2002).) Thus, by prohibiting Bronco from selling its wine in interstate and foreign commerce with labels approved under federal law, section 25241 stands as a direct “obstacle” to the federal scheme which authorizes the export of wine bearing a federally approved label.

Nevertheless, citing to the regulations (27 C.F.R. § 4.25a (b)(1)(iii) (2002) and the Twenty-First Amendment,¹⁵

¹⁵ The Twenty-first Amendment provides in pertinent part: “The transportation or importation into any state ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” (U.S. Const., 21st Amend., § 2.) Under this amendment, the states enjoy broad power to regulate the “importation and use of intoxicating liquor within their borders” (*Capital Cities Cable, Inc. v. Crisp*, *supra*, 467 U.S. at p. 712, 104 S.Ct. at p. 2707, 81 L.Ed.2d at p. 597; *Boller*

intervenor argues there is no federal interest in a national uniform wine labeling system and urges us to conclude that Congress contemplated a dual regulatory system in which federal law merely provides a minimum basis of regulation. We disagree.

The federal statutory and regulatory language expressly state otherwise. (*Hughes Aircraft Co. v. Jacobson* (1999) 525 U.S. 432, 438, 119 S.Ct. 755, 760, 142 L.Ed.2d 881, 891.) The federal statute contains no express preemption provision, and it is clear from the regulatory language that dual regulation is contemplated to a limited extent. Part 4.25a of the regulation, relating to appellations of origin, provides that an "American wine is entitled to an appellation of origin other than . . . a viticultural area, if . . . (iii) it conforms to the laws and regulations of the named appellation area governing

Beverages, Inc. v. Davis, (1962) 38 N.J. 138, 183 A.2d 64, 69-70.) While the Twenty-First Amendment limits the effect of the dormant Commerce Clause, it "does not in any way diminish the force of the Supremacy Clause." (44 *Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 516-517, 116 S.Ct. 1495, 1514-1515, 134 L.Ed.2d 71, 736; *Capital Cities Cable, Inc.*, supra, 467 U.S. at p. 716, 104 S.Ct. at p. 2709, 81 L.Ed.2d at p. 600.)

The Commerce Clause is an express grant of power to Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (U.S. Const., art. I, § 8, cl.3.) It is also an implicit limitation on the states' power to regulate both domestic interstate and foreign commerce, whether or not Congress has acted. (*Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Ore.* (1994) 511 U.S. 93, 97-98, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13, 20.) This implicit limitation is commonly referred to as the "negative" or "dormant" commerce clause. (*Barclays Bank v. Franchise Tax Bd. of Cal.* (1994) 512 U.S. 298, 311, fn. 9, 114 S.Ct. 2268, 2276, fn. 9, 129 L.Ed.2d 244, 257.) Pursuant to its restrictive authority, "any state statute or regulation that impacts domestic interstate or foreign commerce is subject to judicial scrutiny under the [dormant] commerce clause unless the statute or regulation has been preempted, or expressly authorized, by an act of Congress." (*Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 514, 48 Cal.Rptr.2d 582, 907 P.2d 430.)

the *composition, method of manufacture, and designation* of wines made in such place.” (27 C.F.R. § 4.25a (b)(1) (2002), *emphasis added*).¹⁶ ¹⁷ Similarly, imported wine is entitled to an appellation of origin other than a viticultural area if the wine “conforms to the requirements of the foreign laws and regulations governing the *composition, method of production, and designation* of wines” (27 C.F.R. § 4.25a (b)(2)(ii)(2002), *emphasis added*.) However, there is no similar requirement that an American wine labeled with an AVA (American Viticultural Area) conform to state law. (See 27 C.F.R. § 4.25a (e)(3)(iv) (2002).) Rather, brand names are exclusively governed by the federal regulation.

Thus, geographic brand names of viticultural significance are not subject to state regulation. Part 4.39(i)(1) (2002) provides that brand names of viticultural significance used in new COLAs may not be used unless the wine meets the appellation of origin requirements for the geographic area named (27 C.F.R. § 4.39(i)(1) (2002)), and, as we have just stated, the requirements relating to AVAs do not require conformance to state laws and regulations. (27 C.F.R. § 4.25a (e)(3)(iv) (2002).) Likewise, there is no requirement that brand names of viticultural significance used in COLAs issued prior to July 7, 1986, conform to state law. (27 C.F.R.

¹⁶ A wine’s “designation” is distinct from its “brand name” or appellation and refers to the class or type of wine rather than the source-location of the wine. (27 C.F.R. §§ 4.32(a)(2), 4.34(a)(b) (2002).) For example, a wine may be designated by class as a grape wine, sparkling grape wine such as champagne, or a carbonated grape wine (27 C.F.R. § 4.21 (2002)), or by type which refers to the grape varietal. (27 C.F.R. §§ 4.23(a), 4.24, 4.28 (2002).)

¹⁷ California has exercised this authority to impose additional standards relating to the “method of manufacture” and “composition” of wines bearing California appellations, by imposing stricter standards for the use of water and sugar in the production of grape wine (Cal Code Regs., tit. 17, § 17010, subd. (a)) and by requiring that wines bearing the appellation of origin “California” consist of 100 percent California sourced grapes. (Cal. Code Regs., tit. 17, § 17015, subd. (a)(1).)

§ 4.39(i)(1) and (2) (2002).)

In sum, while 27 Code of Federal Regulations part 4.25a (b)(1)(iii)(2002) clearly contemplates state regulation of the appellation of origin for American and imported wine, i.e. "the composition, method of manufacture, and designation of wines made in such place," the grandfather clause does not authorize state regulation of geographic brand names of viticultural significance. The thrust of the respondents' and intervenor's arguments is that the federal system does not provide a complete regulation of interstate sale of wine. That is incorrect. Bronco's federal right to sell its wine interstate is expressly granted under the grandfather clause of 27 Code of Federal Regulations part 39(i)(2)(ii) (2002). There is no grammatical room in this provision for the claim the state may impose an additional requirement on Bronco not contained in the federal law.

2. The History of the Grandfather Clause

There is no doubt that the grandfather clause gives Bronco an express right to introduce its wine in interstate commerce. However, in an excess of caution, Bronco asserts the regulatory history of 27 Code of Federal Regulations part 4.39(i) (2002), establishes the grandfather clause means precisely what it says.

When the original regulations were adopted under the FAAA in 1935, there was no counterpart to part 4.39(i). (49 Fed.Reg. 19330, 19331 (May 7, 1984).) Instead, part 4.33(b), providing for the general regulation concerning misleading brand names, required that, as a condition for the use of a geographic brand name, at least 75 percent of the grapes must be sourced from the area indicated by the brand name, or the word "brand" had to appear in direct conjunction with the geographic brand name and in a size that was one-half the size of the brand name. (49 Fed.Reg., *supra*, at p. 19331.)

For example, the use of a brand name such as "Napa Ridge" was conditioned on compliance with the requirement that 75 percent of the grapes used to produce the wine be sourced with grapes from Napa County or that the wine be labeled "Napa Ridge Brand." This requirement reflected a concern by the regulating agency, the wine industry, and the general public that a geographic brand name conveyed a misleading impression and the belief the use of the word "brand" would dispel any confusion regarding the origin of the grapes used to produce the wine. (*Ibid.*)

In 1938 the regulations were amended to introduce the concept of appellations of origin and a separate section entitled "Appellation of origin" was created. (27 C.F.R. § 4.25 (1938).) To be entitled to designate the appellation of origin, at least 75 percent of the wine's volume had to be produced with grapes grown in the area indicated by the appellation. Additionally, as to geographical brand names, part 4.33(b) was amended to remove all restrictions on geographic brand names unless the brand name was found to be misleading by an ATF official, in which case the word "brand" had to appear in conjunction with the brand name. (49 Fed.Reg., *supra*, at p. 19331.) Theoretically, the brand name of "Napa Ridge" was lawful unless a BATF officer concluded it was misleading, in which case the word "brand" would have to appear alongside the name as "Napa Ridge Brand."

The regulations concerning geographic brand names remained unchanged until 1978 when amendments to the regulations were issued that would have been more restrictive than any to date. The amendments set forth a new provision, part 4.39(i), which prohibited the use of a brand name of geographic significance unless it met one of two requirements, either (1) the wine meet the appellation of origin requirements for that area (the 75 percent requirement) and was bottled in that area, or (2) the brand name was

qualified by the word "brand" in the same size type and as conspicuous as the brand name, for example "Napa Ridge Brand." (49 Fed.Reg., *supra*, at p. 19331; 51 Fed.Reg. 20480-02 (June 5, 1986).)

The mandatory compliance date was extended and in support of their petition to defer the mandatory compliance date, winemakers argued that the word "brand" was not aesthetic and would not preclude misleading impressions conveyed by a geographic brand name. (51 Fed.Reg., *supra*, at p. 20481.) The BATF concluded the regulation was too restrictive and restrained creativity in selecting brand names. (49 Fed.Reg., *supra*, at p. 19331.) For various reasons, including unrelated litigation, BATF delayed the effective date of the new regulation until January 1, 1987. (51 Fed.Reg., *supra*, at p. 20481.) In the end, the regulation never took effect.

However, in 1984, during this period of delay, and in response to the concerns of the winemakers, BATF proposed four alternatives to the existing regulation and published them for comment. Alternative 1 left the regulation as stated in the 1978 amendments; Alternative 2 eliminated the current regulation, and therefore, a brand name of geographic significance could be used unless found to be misleading, in which case it would have to be qualified by the word "brand" under part 4.33(b).¹⁸ Alternative 3 left the existing requirements of part 4.39(i) in place but amended the type size requirement for the word "brand" by requiring that it only be half the size of the brand name, i.e. Napa Ridge Brand; Alternative 4, which the BATF proposed, prohibited the use of a brand name of viticultural significance unless (a)

¹⁸ The BATF expressed its view of this alternative stating that "ATF believes the wine industry should be allowed flexibility in selecting brand names under which to market their products without having a whole class of brand names become totally unusable." (49 Fed.Reg., *supra*, at pp. 19331-19332.)

a correct appellation of origin was used and the wine was bottled in that appellation, or (b) the brand name was qualified by the word "brand" in the same size of type and as conspicuous as the brand name itself, or (c) the wine was labeled with an appellation of origin as specified, or (d) the label bears a statement found by the Director to dispel any misconception about the appellation of origin. (51 Fed.Reg., *supra*, at p. 20481.) None of these alternatives were adopted in whole.

In 1986, after public hearings and review of comments, BATF adopted the current regulation. (27 C.F.R. § 4.39(i)(1986).) As set forth ante, as to new labels, the rule is stricter than any of the proposed alternatives. BATF believed the brand name, because it is the most prominent item on a wine label, indicates to the consumer the place where the grapes used to produce the wine are grown. The BATF concluded the word "brand" does not dispel a misleading impression conveyed by a brand name of viticultural significance which does not meet the appellation of origin requirements for the geographic area named. (51 Fed.Reg., *supra*, at p. 20481.)

However, for brand names of viticultural significance used in COLAs issued prior to July 7, 1986, the effective date of the rule, the regulation requires that an appellation of origin be specified on the label. (27 C.F.R. § 4.39(i)(2)(ii)(2002).) The BATF concluded the rule would provide the industry "with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names." (51 Fed.Reg., *supra*, at p. 20482.) In effect, this rule takes the 1938 regulation one step further in "the general belief . . . that an appellation of origin would dispel misleading impressions that a geographic brand name may have conveyed." (49 Fed.Reg., *supra*, at p. 19331.)

Thus, the rule-making history clearly indicates that the BATF considered several alternative means of protecting consumers while also attempting to protect the competing interests of fair competition and existing economic interests. In so doing, the BATF considered the alternative expressed in section 25241 and deliberately rejected it as inappropriate. In so doing, the BATF preempted the states from enacting such a rule. (*Ray v. Atlantic Richfield Co.*, *supra*, 435 U.S. at p. 178, 98 S.Ct. at p. 1004, 55 L.Ed.2d at p. 201.)

Nevertheless, respondents contend the grandfather provision is based upon a compromise of consumer protection in favor of market factors that goes beyond the congressional purpose, and that section 25241 is not preempted because it has the same consumer-protection objective as the FAAA. We reject both arguments.

Respondents make no direct claim the federal regulation is invalid. (See fn. 4, *supra*.) As for the compromise, we think BATF struck a legitimate regulatory balance between the interests of consumer protection and unfair business practices. (See *Arrow Distilleries, Inc. v. Alexander*, *supra*, 109 F.2d at p. 402; *Continental Distilling Corporation v. Shultz*, *supra*, 472 F.2d at pp. 1370-1371.) Defining unfair competition and business practices necessarily includes considerations of market factors.

As to respondents' second claim, the Supreme Court has rejected the argument that state law is not preempted by federal law when the two regulations share common goals. (*Florida Lime & Avocado Growers*, *supra*, 373 U.S. at p. 142, 83 S.Ct. at p. 1217, 10 L.Ed.2d at p. 256.) "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this [shared] goal." (*International Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883, 900; *Crosby v.*

National Foreign Trade Council, supra, 530 U.S. at pp. 379-380, 120 S.Ct. at pp. 2297-2298, 147 L.Ed.2d at pp. 365-366; *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 103, 112 S.Ct. 2374, 2385, 120 L.Ed.2d 73, 88 (Illinois worker safety law with identical purpose to federal Occupational Safety and Health Act preempted where it interfered with methods of the federal statute); *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at p. 165, 98 S.Ct. at p. 998, 55 L.Ed.2d at p. 193, (state law shared same goals with federal scheme, but interfered with the methods of the federal scheme regulating vessel safety and marine environment protection).)

Section 25241 interferes with federal regulations that expressly authorize the use of brand names of viticultural significance on wine labels bearing appellations of origin by effectively nullifying the effect of the COLAs issued for those labels. We therefore hold that section 25241 is preempted by federal regulations and federal COLAs as to brand names on wine labels destined for interstate and foreign commerce.

We have left to consider the effect of this holding on section 25241.

II Severability

A statute that is constitutionally invalid is "not ineffective and inoperative to the extent that its invalid parts can be severed from any valid ones." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613, 88 Cal.Rptr.2d 56, 981 P.2d 990 (*Hotel Employees*); *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821-822, 258 Cal.Rptr. 161, 771 P.2d 1247 (*Calfarm Ins. Co.*); *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 330, 226 Cal.Rptr. 640.) "An invalid part can be severed if, and only if, it is

'grammatically, functionally and volitionally separable.'" (Hotel Employees, *supra*, 21 Cal.4th at p. 613, 88 Cal.Rptr.2d 56, 981 P.2d 990, quoting *Calfarm Ins. Co.*, *supra*, 48 Cal.3d at p. 821, 258 Cal.Rptr. 161, 771 P.2d 1247.)

We find section 25241, as applied, fails the grammatical test and is therefore wholly invalid.

This Court has discussed the concept of grammatical severability. "Severability ' " is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. [Citations.] [W]here there is no possibility of mechanical severance, as where the language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words, the problem is quite different and more difficult of solution." ' " (*People's Advocate, Inc. v. Superior Court*, *supra*, 181 Cal.App.3d at p. 330, 226 Cal.Rptr. 640, (*People's Advocate, Inc.*), italics in original, quoting *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330-331, 118 Cal.Rptr. 637, 530 P.2d 605, quoting from *In re Blaney* (1947) 30 Cal.2d 643, 655, 184 P.2d 892.)

Bronco contends that, on its face, section 25241 contains no distinct and severable provision relating to wines destined for sale in interstate and foreign commerce. They argue the application of the statute to interstate and intrastate commerce cannot be separated grammatically because of the structure of the statute and other provisions of the Alcoholic Beverage Control Act, and the custom of doing business within a nationwide "three-tier system" of suppliers, wholesalers, and retailers.

Intervenor, joined by respondents, argues the only part of the statute that has direct extraterritorial effect relates to

wine that is "produced, bottled, [or] labeled" in California. (§ 25241, subd.(b).) That portion, they claim, is easily severable from the part of section 25241 which regulates wine "offered for sale or sold" in California. These sales, according to intervenor, are wholly intrastate transactions subject to state regulation. We disagree.

It is readily apparent the terms "produced, bottled, [or] labeled . . . in California" apply equally to wines destined for sale to consumers within California and to wine destined for sale to consumers outside California. Thus, application of these terms to wines destined for intrastate sale cannot be severed from the application of these terms to wines destined for interstate and foreign commerce.

Intervenor essentially claims that as long as the wine is sold first to a California wholesaler before it is sold or shipped outside of California, the wine is not in interstate and foreign commerce. We disagree with respondents.

The legislative history of section 25241 demonstrates the Legislature's objective in enacting section 25241 was to halt the sale and advertisement of wine bearing the prohibited brand names by closing the "loophole" in the grandfather clause of the federal wine labeling regulations concerning geographic brand names.¹⁹

The statute's prohibitory clause states:

¹⁹ The legislative history is replete with statements regarding the worldwide reputation of Napa Valley wines and the necessity of closing the federal loophole to protect that reputation. The inference is unmistakable that section 25241 was designed to reach interstate and foreign commerce because federal wine labeling regulations apply only to wines shipped or sold in interstate and foreign commerce. (27 U.S.C. § 205(e); 27 C.F.R. § 4.30(a) (2002).) In attempting to close that "loophole" the Legislature clearly sought to affect the shipment of wine in interstate and foreign commerce.

"No wine *produced, bottled, labeled, offered for sale or sold in California* shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240." (§ 25241, subd. (b), emphasis added.)

Section 25241 does not, by its terms, distinguish between wine destined for sale within California and wine destined for sale outside California. The terms "offered for sale or sold in California" also apply both to wines sold to California consumers as well as to wine destined for sale outside California. Section 25241 does not define "offered for sale or sold in California" nor does it limit those transactions to sales to California consumers. Rather, the terms "sell," "sale" and "to sell," are defined in another section, section 23025, to include "any transaction whereby ... title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and soliciting or receiving an order for such beverages" Moreover, section 23026 defines " '[r]etail sale' "and" 'sale at retail' "as" the sale by an on- or off-sale licensee for consumption and not for resale," while section 23027 defines " '[w]holesale sale' "and" 'sale at wholesale' "as" a sale to any licensee for purposes of resale."

In sum, "sale" includes both retail sales to consumers and sales to a licensed wholesaler for purposes of resale outside of California.

Bronco's California license as a manufacturer or wine

grower authorizes it, among other things, to "export" its wine, as well as to sell its wine to "persons holding wholesaler's ... licenses . . . and to persons who take delivery of such alcoholic beverages within this State for delivery or use without the State." (§ 23356, subd. (c).)²⁰

It is Bronco's business practice, as authorized by statute, to sell all of its wine to California wholesalers who then sell it to California retailers and to wholesalers or retailers outside California. Thus, all of Bronco's wine is sold first by Bronco within California, regardless whether the wine is destined for resale to California consumers or to consumers in national and foreign markets. Section 25241, within the statutory scheme of which it is a part, does not provide a grammatical or functional mechanism by which to determine which wine is sold to wholesalers for resale in California and which wine is sold for resale outside California.

It is well established that goods destined for sale outside the state of production are a part of interstate commerce as soon as they begin their journey to the ultimate consumer, regardless whether the party making the sale transports the goods across state or national lines before title first passes to another party. (*See Maryland v. Louisiana* (1981) 451 U.S. 725, 755, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576, 601 ("Gas crossing a state line at any stage of its

²⁰ Under a traditional "three-tier system" of producers, wholesalers, and retailers, a winery is not authorized to sell its wine directly to out-of-state retailers or consumers, but must operate within the three-tier system. (*See Bridenbaugh v. Freeman-Wilson* (7th Cir.2000) 227 F.3d 848, 851, cert. denied, (2000) 532 U.S. 1002, 121 S.Ct. 1672, 149 L.Ed.2d 652, (explaining three-tier system and legal barriers to direct sales by wine producers to consumers located in other states); *Kendall-Jackson Winery, Ltd. v. Branson* (N.D.Ill.2000) 82 F.Supp.2d 844, 850-851.) California's system is not a true "three-tier system" because it allows the manufacturer or producer of alcoholic beverages to export its alcoholic beverages directly without going through a California wholesaler. (§ 23356, subd. (b).)

movement to the ultimate consumer is in interstate commerce during the entire journey.”); *Shafer v. Farmers Grain Co.* (1925) 268 U.S. 189, 199- 201, 45 S.Ct. 481, 485-486, 69 L.Ed. 909, 915 (wheat produced within North Dakota and sold within the state is part of interstate commerce when offered for shipment outside the state); *U.S. v. Food*, 2998 Cases (5th Cir.1995) 64 F.3d 984, 988 (goods destined for sale to a state other than the place from which they are shipped are in interstate commerce for the entire journey).) Therefore, wine produced in California for shipment and resale outside California is wine in interstate and foreign commerce, whether the producer of the wine exports it directly or sells it to a California wholesaler who then sells it for shipment outside of California.

Intervenor argues that Bronco mischaracterizes the “three-tier-system,” claiming it is not required to sell its wine to wholesalers within California and that Bronco’s decision to sell all of its wine to in-state wholesalers rather than to export it directly, is merely a business practice which Bronco has freely chosen because it is presumably more profitable. Intervenor therefore concludes the three-tier system used by other states, which Bronco has chosen to use, does not “preempt” section 25241. Intervenor is mistaken.

First, we have already determined the question of preemption. Second, for purposes of determining severability, the issue does not turn on the effect of a three-tiered system used in other states but rather the application of section 25241 within the statutory scheme of which it is a part. That scheme defines the sale of wine to include sale of wine to wholesalers for resale within California as well as for resale in interstate and foreign commerce. (§§ 23025, 23027.) As we have stated, as a manufacturer or winegrower, Bronco’s license authorizes it to sell its wine to California wholesalers for shipment out-of-state. (§ 23356, subd. (c).)

While the statutory scheme does not require that a California wholesaler be employed to sell and distribute wine in interstate and foreign commerce, it authorizes that practice. As a result, the terms "offered for sale or sold in California" necessarily apply to the sale of wine destined for California markets as well as to national and foreign markets. For this reason, the language of section 25241 is " "so broad as to cover subjects within and without the legislative power . . . [which] cannot be cured by excising any word or group of words" " (People's Advocate Inc., *supra*, 181 Cal.App.3d at p. 330, 226 Cal.Rptr. 640, quoting from *Santa Barbara Sch. Dist. v. Sup. Ct.* (1975) 13 Cal.3d at pp. 330-331, 118 Cal.Rptr. 637, 530 P.2d 605, emphasis added.)

Because under the grammatical test, application of the statutory terms to wine sold within California is not severable from application of the statute to wine destined for interstate and foreign commerce under the grammatical test, we hold that the statute as a whole is invalid.

DISPOSITION

Let a peremptory writ of mandate issue to respondent Manuel R. Espinoza, Interim Director of the Department of Alcoholic Beverage Control, and respondent Department of Alcoholic Beverage Control, directing them to take no action to enforce Business and Professions Code section 25241. The alternative writ, issued July 18, 2001, in this proceeding, is discharged. The previously issued stay of enforcement of section 25241 is vacated. Bronco is awarded its costs in these proceedings. (Cal. Rules of Court, rule 56.4(a).)

We concur: RAYE and MORRISON, J.

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APPENDIX D

Court of Appeal, Third Appellate District
No. C037254
S113136

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BRONCO WINE COMPANY et al., Petitioners,

v.

JERRY R. JOLLY as Director etc., Respondent;
NAPA VALLEY VINTNERS ASSOCIATION, Intervenor.

Opinion modified.
Petition for rehearing DENIED.

Werdegar, J., was recused and did not participate.

George
Chief Justice

IN THE SUPREME COURT OF CALIFORNIA

BRONCO WINE COMPANY)	
et al.,)	
)	
Petitioners,)	
)	
v.)	
)	
JERRY R. JOLLY, as)	S113136
Director, etc., et al.,)	
)	Ct. App. 3,
Respondents;)	No. C037254
)	
NAPA VALLEY VINTNERS')	ORDER MODIFYING
ASSOCIATION,)	OPINION
)	[NO CHANGE IN
Intervener.)	JUDGMENT]
)	

BY THE COURT:

The opinion herein, appearing at 33 Cal.4th 943, is modified as follows:

1. In the sentence beginning on page 951 and continuing on page 952, the word "almost" is inserted between the words "used" and "exclusively," so that the sentence reads, "Under Bronco's ownership, all three of these brands have been used almost exclusively to sell wines made from grapes grown outside Napa County."

2. In the second sentence of footnote 5 on page 952, the term "scientific surveys" is replaced with the term "survey results," so that the sentence reads, "The Legislature's findings to the contrary, however, are supported both by testimony and survey results presented at the

hearings disclosing consumer confusion relating to such labels.”

3. In the first sentence of the last partial paragraph on page 978, the word “any” between the words “preempt” and “more” is deleted, so that the sentence reads, “Bronco further suggests that *subsequent* to the enactment of 27 United States Code section 205(e) in August 1935 and the adoption, by agencies within the Department of the Treasury, of implementing regulations, both Congress and the federal regulators manifested intent that the federal wine labeling regulations would preempt more stringent state wine labeling regulations.”

4. In the last two sentences of the full paragraph on page 980 and the citation between the sentences, the words “additionally and broadly” between the words “regulation” and “barred” are deleted, the word “ ‘production’ ” is replaced with the word “sale,” the reference to section 6 in the citation is deleted, and the words “for wines produced” between the words “barred” and “in” are deleted, so that these sentences and citation read, “Third, by 1942, a California regulation barred the sale of wines labeled with so-called coined (or semi-generic) brand names if the ‘brand designation resembles an established wine type name such as . . . Madeira, . . . Port, . . . Claret, [or] Burgundy, etc. . . . ‘ (See 1942 Regs., art. II, § 8.) Under this and subsequent versions of the same regulation, a label such as ‘Burgundy brand’ was long barred in California.⁵⁰”

5. In the second sentence of the first paragraph on page 981, the words “for wines produced in California” between the words “prohibited” and “name,” together with the accompanying commas, are deleted, so that the sentence reads, “The third provision described above prohibited name types that the federal regulations have permitted since 1941 upon a proper showing.”

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The modification does not affect the judgment.

169a

NO. S113136

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

To The Court of Appeal, Third Appellate District

BRONCO WINE COMPANY, et al.,
Petitioners,

S113136
Court of Appeals
No. C037254

v.

JERRY R. JOLLY,
as Director, etc., Respondent;

NAPA VALLEY VINTNERS
ASSOCIATION,
Intervenor.

I, FREDERICK K. OHLRICH, Clerk of the Supreme Court of the State of California, do hereby certify that the attached are copies of the original judgment now final entered in the above-entitled cause on August 5, 2004.

Costs, if any, shall be awarded by the Court of Appeal.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, October 13, 2004

FREDERICK K. OHLRICH, Clerk

SEAL

By Deborah Benko
DEPUTY

APPENDIX E

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

THIRD APPELLATE DISTRICT

(Sacramento)

BRONCO WINE COMPANY)	
et al.)	
)	
Petitioners,)	
)	
v.)	
)	
JERRY R. JOLLY, as Director,)	
etc., et al.,)	
)	
Respondents;)	Ct. App. 3,
)	No. CO37254
NAPA VALLEY VINTNERS)	
MODIFICATION)	
ASSOCIATION,)	OF OPINION
DENIAL OF)	AND
)	PETITION FOR
Intervener.)	REHEARING

BY THE COURT:

The opinion of this court filed May 26, 2005, in the
above entitled case is modified as follows:

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On page 15, third line from the bottom, replace "any services" with "the product", and delete "Moreover, trade names" so that the line reads as follows:

"quality of the product offered and need not".

On page 16, 3rd line, delete "By contrast" and insert the following in its place:

"While a brand name generally does not have intrinsic meaning,".

On page 16, 6th line down, insert the following after "brand name": "of geographic significance".

This modification does not effect a change in the judgment.

The petition for rehearing is denied.

BY THE COURT:

_____BLEASE_____, Acting P.J.

_____RAYE_____, J.

_____MORRISON_____, J.

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APPENDIX F

Court of Appeal, Third Appellate District – No. C037254
S135306

IN THE SUPREME COURT OF CALIFORNIA
En Blanc

BRONCO WINE COMPANY et al., Petitioners,

v.

JERRY R. JOLLY as Director etc. et al., Respondents;

NAPA VALLEY VINTNERS ASSOCIATION, INTERVENOR.

Application to appear as counsel pro hac vice granted.
Petition for review DENIED.

Werdegar, J., was recused and did not participate.

SUPREME COURT
FILED

AUG 24 2005

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

APPENDIX G

The Supremacy Clause to the United States Constitution provides, in relevant part, that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art VI, cl. 2.

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I.

APPENDIX H**27 U.S.C. §205(e) – Unfair competition and unlawful practices**

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(e) Labeling

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container

(1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer;

(2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are

prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product;

(3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled;

(4) as will prohibit statements on the label that are disparaging of a competitor's product or are false, misleading, obscene, or indecent; and

(5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as well prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: Provided, That this clause shall not apply to the use of the name of any person

engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 29, 1935; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: Provided further, That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent and Trademark Office which has been used by such person or predecessors in the United States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection,

(1) no bottler of distilled spirits, no producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and

(2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine, or malt beverages, respectively, after such date as the Secretary of the Treasury fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Secretary of the Treasury, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary in such manner and form as he shall by regulations prescribe: Provided, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Secretary, he shows to the satisfaction of the Secretary that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or

delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Secretary; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; or

APPENDIX I

27 C.F.R. §4.25 (entitled "Appellations of Origin") provides in pertinent part:

(e) *Viticultural area*—(1) *Definition*—(i) *American wine.* A delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of this chapter.

27 C.F.R. §4.30 (entitled "General") provides in pertinent part:

(a) *Application.* No person engaged in business as a producer, rectifier, blender, importer, or wholesaler, directly or indirectly or through an affiliate, shall sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or receive therein, or remove from customs custody, any wine in containers unless such wine is packaged, and such packages are marked, branded, and labeled in conformity with this subpart. Wine domestically bottled or packed prior to Dec. 15, 1936, and imported wine entered in customs bond in containers prior to that date shall be regarded as being packaged, marked, branded and labeled in accordance with this subpart, if the labels on such wine (1) bear all the mandatory label information required by §64.32, even though such information is not set forth in the manner and form as required by §4.32 and other sections of this title referred to therein, and (2) bear no statements, designs, or devices which are false or misleading.

27 C.F.R. §4.32 (entitled "Mandatory label information") provides in pertinent part:

- (a) There shall be stated on the brand label:
 - (1) Brand name, in accordance with §4.33.

27 C.F.R. §4.33 (entitled "Brand names") provides in pertinent part:

(a) *General.* The product shall bear a brand name,

(b) *Misleading brand names.* No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter creates any impression or inference as to the age, origin, identity, or other characteristics of the product unless the appropriate ATF officer finds that such brand name, either when qualified by the word "brand" or when not so qualified, conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product. . . .

27 C.F.R. §4.34 (entitled "Class and Type") provides in pertinent part:

(b) An appellation of origin such as "American," "New York," "Napa Valley," or "Chilean," disclosing the true place of origin of the wine, shall appear in direct conjunction with and in lettering substantially as conspicuous as the class and type designation if:

(1) A varietal (grape type) designation is used under the provisions of §4.23;

(2) A type designation of varietal significance is used under the provisions of §4.28;

(3) A semi-generic type designation is employed as the class and type designation of the wine pursuant to §4.24(b);

(4) A product name is qualified with the word "Brand" under the requirements of §4.39(j); or

(5) The wine is labeled with the year of harvest of the grapes, and otherwise conforms with the provisions of §4.27. The appellation of origin for vintage wine shall be other than a country.

27 C.F.R. §4.39 (entitled "Prohibited Practices") provides in pertinent part:

(i) *Geographic Brand Names.*

(1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:

(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

(ii) The wine shall be labeled with an appellation of origin in accordance with §4.34(b) as to location and size of type of either: (A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or; (B) A state, county or a viticultural area, if the brand name bears a state name; or

(iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

(3) A name has viticultural significance when it is the name of a state or county (or the

foreign equivalents), when approved as a viticultural area in Part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer.

27 C.F.R. §4.50 (entitled "Certificates of Label Approval") provides:

(a) No person shall bottle or pack wine, other than wine bottled or packed in U.S. Customs custody, or remove such wine from the plant where bottled or packed, unless an approved certificate of label approval, ATF Form 5100.31, is issued by the appropriate ATF officer.

(b) Any bottler or packer of wine shall be exempt from the requirements of this section if upon application the bottler or packer shows to the satisfaction of the appropriate ATF officer that the wine to be bottled or packed is not to be sold, offered for sale, or shipped or delivered for shipment, or otherwise introduced in interstate or foreign commerce. Application for exemption shall be made on ATF Form 5100.31 in accordance with instructions on the form. If the application is approved, a certificate of exemption will be issued on the same form.

(c) *Cross reference.* For procedures regarding the issuance, denial, and revocation of certificates of label approval, and certificates of exemption from label approval, as well as appeal procedures, see part 13 of this chapter.

27 C.F.R. §13.21 (entitled "Application for Certificate") provides in pertinent part:

(a) *Form of application.* An applicant for a certificate of label approval, certificate of exemption from label approval, or distinctive

liquor bottle approval, must send or deliver signed duplicate copies of ATF Form 5100.31, "Application For And Certification/Exemption Of Label/Bottle Approval" according to the instructions for that form. If the application complies with applicable laws and regulations, a certificate of label approval, certificate of exemption from label approval, or distinctive liquor bottle approval will be issued. If the approval is qualified in any manner, such qualifications will be set forth in the appropriate space on the form.

APPENDIX J**California Business and Professions Code §25241**

(a)(1) The Legislature finds and declares that for more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County.

(2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices.

(3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.

(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a [now section 4.25--see 68 *Federal Register* 39454, 39455 (July 2, 2003)] of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the

label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.

Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations.

(c) The following are names of viticultural significance for purposes of this section:

(1) Napa.

(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of the Code of Federal Regulations that is located entirely within Napa County.

(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

(f) The department may suspend or revoke the license of any person who produces or bottles wine

who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001.

(5)
No. 05-653

FILED

REC-23-2005

IN THE

Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT, U.S.

BRONCO WINE COMPANY AND BARREL TEN QUARTER CIRCLE,
Petitioners,

v.

**JERRY R. JOLLY, Director of the California Department of
Alcoholic Beverage Control; California Department of
Alcoholic Beverage Control; and the Napa Valley Vintners
Association,**

Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of California**

**BRIEF FOR RESPONDENT NAPA VALLEY
VINTNERS ASSOCIATION IN OPPOSITION**

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December 23, 2005

QUESTIONS PRESENTED

- I. Whether a California statute prohibiting wine producers from mislabeling non-Napa wine as Napa wine is impliedly preempted by federal regulations.
- II. Whether a statute prohibiting as false and misleading the mislabeling of non-Napa wine as Napa wine violates the First Amendment.

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns more than 10% of the stock of the Napa Valley Vintners Association.

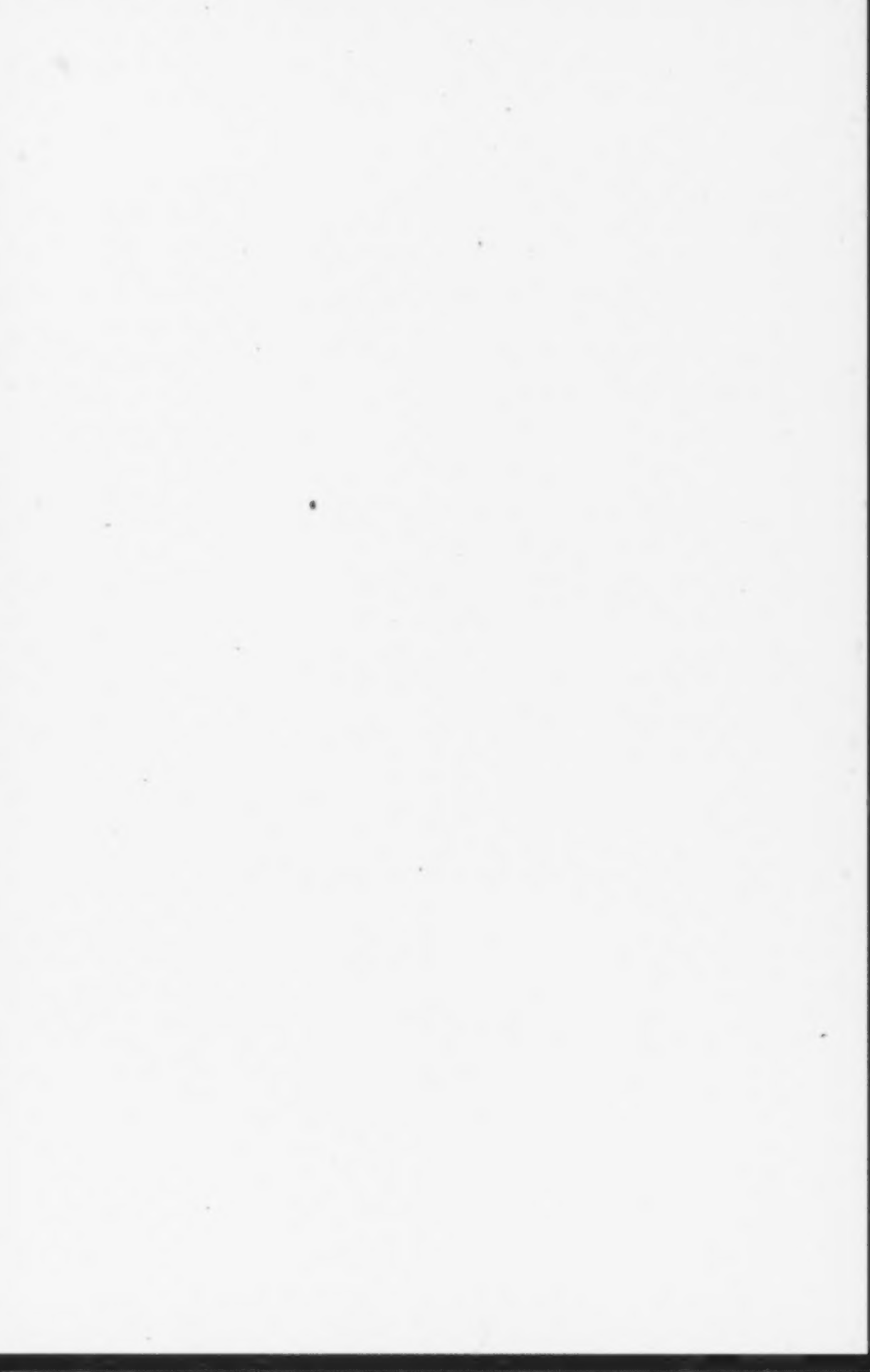


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STATEMENT OF THE CASE

California Business and Professions Code § 25241 provides that wines produced or marketed in California shall not use a "Napa" brand name on the label unless the wine is made from Napa grapes. The California Legislature enacted § 25241 to redress the actual and potential misuse of Napa names on non-Napa wines. Federal regulations, though generally requiring truthful branding on wine labels, include a "grandfather clause" that tolerates certain geographically misdescriptive names if they were in use prior to July 7, 1986. Petitioners Bronco Wine Company and Barrel Ten Quarter Circle (collectively "Bronco" or "Petitioners") prominently exploited the federal grandfather clause by purchasing Napa brand names for use on wines made with inexpensive non-Napa grapes. They now complain that § 25241 is preempted by federal law and that their geographically misdescriptive labels are entitled to First Amendment protection.

Petitioners' challenge to § 25241 comes before this Court for the second time. See *Bronco Wine Co. v. Jolly*, 125 S. Ct. 1646 (Mar. 21, 2005) (denying cert.). Their first Petition followed a unanimous decision of the California Supreme Court, holding that § 25241 was not preempted by federal law and remanding for consideration of Petitioners' First Amendment and other claims. *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004) (George, C.J.), App. 1a-71a. Following this Court's denial of certiorari, the California Court of Appeal unanimously rejected Petitioners' First Amendment and other challenges to § 25241, and the California Supreme Court denied review.

Neither the preemption nor free-speech issue warrants review by this Court. Both are garden-variety—and meritless—challenges to a State consumer protection law prohibiting deceptive labeling.

A. The State and Federal Regulatory Scheme.

The States' Exercise of Their Traditional Police Powers To Protect Against Misleading Brand Names and Labels on Food and Beverages—Particularly Wine

The States have long exercised their traditional police powers to protect consumers from misleading labeling of food and beverages, including misleading brand names on wine labels, both before and since the advent of federal wine label regulation in the Nineteen Thirties. Beginning in the latter half of the Nineteenth Century, many, if not most, States regulated the marketing of impure or deceptively labeled foods and beverages, including liquors and wines. App. 15a-18a. California—now and then by far the largest producer of wine in the nation—has been regulating wine for more than 140 years. In 1860, California enacted a statute to penalize the sale of “adulterated alcoholic or spirituous liquors, wines” or other beverages. Act of Apr. 14, 1860, ch. 223, § 2, 1860 Cal. Stat. 186 (codified at Cal. Penal Code § 382). California enacted another statute in 1887 that dealt comprehensively with the production and labeling of wine. Act of Mar. 7, 1887, ch. 36, 1887 Cal. Stat. 46.

In 1907, to combat the labeling of California wines as foreign wines, the California Legislature adopted a statute requiring a “uniform wine nomenclature” that, for the first time, specifically regulated the use of place names on wine labels. Act of Mar. 6, 1907, ch. 104, 1907 Cal. Stat. 127. That same year, California also adopted a statute addressing the problem of “adulterated, mislabeled or misbranded food or liquor.” Act of Mar. 11, 1907, ch. 181, § 1, 1907 Cal. Stat. 208. In 1908, California’s Department of Public Health adopted comprehensive implementing regulations that prohibited mislabeling concerning the place of origin. App. 31a n.32. Continuing through the next three decades, California and many other States adopted statutes specifically regulating mislabel-

ing and misbranding of wine that exceeded the requirements of federal law. *Id.* 31a, 35a-36a.

By contrast, until the Nineteen Thirties, there was relatively limited federal activity on the subject of wine labeling and misbranding. The federal role focused primarily on taxation and was not significant compared to that of the States. No enforceable federal regulations existed regarding wine and no federal agency had the authority to regulate alcoholic beverage labeling.¹ *Id.* 22a-29a, 35a.

Congress's Intent To Supplement, Not Supplant, State Regulation of Wine Labeling, and BATF's Understanding that States Could Impose More Stringent Standards

Congress entered the field of wine label regulation only in the Nineteen Thirties, most importantly by enacting the Federal Alcohol Administration Act ("FAA Act"), Pub. L. No. 74-401, 49 Stat. 977 (1935) (codified as amended 27 U.S.C. §§ 201-211). The FAA Act bars misleading statements on wine labels and requires wine producers to obtain for each label a certificate of label approval, or "COLA," evidencing its compliance with federal standards. The Bureau of Alcohol, Tobacco and Firearms ("BATF")—the office within the U.S. Department of Treasury formerly charged with enforcing the FAA Act²—has enacted a series of regulations regarding wine labeling through notice-and-comment rulemaking. However, neither Congress, through

¹ Certain "food standards" adopted by the U.S. Secretary of Agriculture in 1904, which included wine standards, were merely advisory and not legally binding, and a "Food Inspection Decision" issued by three federal department secretaries in 1910 actually deferred to and acquiesced in the applicable State wine statute. App. 24a-26a.

² Under the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(d), 116 Stat. 2135, 2275 (2002), BATF's functions under the FAA Act are now performed by the Alcohol and Tobacco Tax and Trade Bureau. See also 68 Fed. Reg. 3744 (Jan. 24, 2003). For consistency, both will be referred to as BATF.

the FAA Act, nor BATF, through its regulations, has expressed any intent to supersede the States' concurrent or more stringent regulation of wine under their traditional police powers.

Nothing in the language or legislative history of the FAA Act reveals a congressional intent to preempt State wine regulations. Representative Cullen of New York, the author of the Act, remarked in the floor debates that its purpose was "to supplement legislation by the States to carry out their own policies" because the States "alone cannot do the whole job." 79 Cong. Rec. 11,714 (July 27, 1935) (statement of Rep. Cullen); *accord* H.R. Rep. No. 74-1542, at 2-3 (1935). At the same time he added that "[n]o power is taken away from the States to provide such safeguards as they deem best for their own protection." 79 Cong. Rec. 11,714 (statement of Rep. Cullen).

By December 1934, California also had specific and detailed wine regulations restricting the use of place names on wine labels. After passage of the FAA Act in 1935, California's requirements continued to exceed federal requirements. The first regulations under the FAA Act became effective in 1936. See 1 Fed. Reg. 83 (Apr. 1, 1936). As amended in 1938, they stated that a wine is entitled to be described with an "appellation of origin" (the geographic source of the grapes) if "at least 75 percent of the wine is derived from fruit . . . grown in the appellation area indicated" and "it conforms to the [State and local] laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such state." 3 Fed. Reg. 2093 (Aug. 26, 1938) (codified at 27 C.F.R. §§ 4.25(b)(1)(i), (iii)). Soon thereafter, California enacted a statute strengthening certain wine labeling requirements. See Act of July 22, 1939, ch. 1033, §§ 1-4, 1939 Cal. Stat. 2838 (codified at Cal. Bus. & Prof. Code §§ 25236-25238). It also promulgated regulations imposing a 100 percent grape-origin requirement for any wine labeled as "California" or any

geographical subdivision thereof." App. 45a-46a. In these and other instances, the California Legislature authorized State wine regulations that were stricter than federal wine regulations. App. 46a.

The federal government consistently has recognized the States' authority to impose different or stricter standards for wine labeling. In 1978, BATF adopted rules concerning appellations of origin for a new subcategory known as "viticultural areas," see 43 Fed. Reg. 37,672, 37,674, 37,678 (Aug. 23, 1978), which are "grape growing region[s] distinguishable by geographic features, the boundaries of which have been recognized and defined" by BATF, see 27 C.F.R. § 4.25(e)(1)(i). Under these regulations, a "viticultural area" could be mentioned on a wine label only if at least 85 percent of the grapes used to make the wine were grown in that viticultural area. *Id.* The 1978 federal regulations expressly recognized State authority, however, by making the right to place a "viticultural area" designation on a wine label also contingent on compliance with "*the laws and regulations of all the states contained in the viticultural area.*" 27 C.F.R. § 4.25a(e)(3)(iv) (1978-1981); *Id.* § 4.25a(e)(3)(v) (1981-1986) (emphasis added).

The 1978 federal regulation, for example, left in place an Oregon geographic brand name that was stricter than the federal rule. The Oregon rule provided that the names of Oregon counties or wine-producing regions could not be used in a brand name "unless 100 percent of the grapes used to produce that wine were grown within the boundaries of that appellation of origin." See Or. Admin. R. 845-10-292(6)(c)(2) (1977) (currently codified at Or. Admin. R. 845-010-0920(2)). Since Oregon's adoption of the regulation in 1977, BATF has expressed no hostility to Oregon's stricter rule, which remains in force today. In 1986, in the course of repealing former 27 C.F.R. § 4.25a(e)(3)(v) concerning compliance with State regulations, BATF repeatedly acknowledged the existence and enforceability of Oregon's "more

stringent" wine labeling regulations. BATF observed that "regulations of Oregon and Washington differ greatly regarding the production *and labeling* of wine. Oregon regulations are more stringent than Federal regulations." 51 Fed. Reg. 3773, 3774 (Jan. 30, 1986) (emphasis added).

BATF repealed former § 4.25a(e)(3)(v) because it was too burdensome for the federal government to enforce all of the States' laws and regulations. BATF observed:

A Federal requirement for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce due to the multitude of state and local laws and regulations State laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved.

51 Fed. Reg. 3773. Underscoring the point, BATF stated, "[t]he State laws and regulations remain in effect and continue to be enforced by the agencies of the states involved in winemaking." *Id.* BATF thus made clear that States may impose more stringent labeling rules.³

The Federal "Grandfather Clause" in BATF's 1986 Regulation

In July 1986, six months after BATF affirmed that State laws and regulations are enforced by the State involved,

³ Where Congress and BATF have desired to preempt State labeling regulations on alcoholic beverages, they have done so expressly. In 1988, Congress amended the FAA Act to require that wine and other alcoholic beverages carry a health warning on the back label. Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, § 8001(a)(3), 102 Stat. 4518 (1988) (codified at 27 U.S.C. §§ 213-219a). Congress expressly provided for federal preemption of such health warnings on alcoholic beverage labels. 27 U.S.C. § 213. BATF adopted implementing regulations that expressly reaffirmed the preemptive effect of that regulation. See 27 C.F.R. § 16.32. In contrast, neither Congress nor BATF has ever indicated an intent to preempt State wine labeling laws such as § 25241.

BATF adopted revised regulations regarding geographic brand names. BATF explicitly determined that consumers believe that a geographic brand name on a wine label indicates the source of the grapes. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986) ("In the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes are grown."). It further found that the inclusion of an accurate appellation of origin on the front label was insufficient to dispel the misimpression created by a misleading geographic brand name. *Id.* The 1986 federal regulation avoids such consumer confusion by prohibiting the use of a label bearing a geographic brand name unless the wine meets the appellation of origin requirements for the geographic area named. See 27 C.F.R. § 4.39(i)(1); see also *id.* § 4.25(b)(1)(i).

A "grandfather clause" appended to the federal regulation, however, does not apply these more stringent labeling standards if the labels were in use prior to July 7, 1986, so long as an accurate appellation of origin is also included. *Id.* § 4.39(i)(2)(ii). BATF made no finding that geographically misdescriptive brand names in use prior to July 7, 1986 were any less misleading than those that came into use on or after that date and gave no reason for promulgating a lower standard for such brands. Moreover, BATF did not consider or take into account local conditions affecting the use of specific geographic brand names or the misuse of Napa brand names in particular. The language that Petitioners quote from the *Federal Register* notice to suggest that BATF viewed the "grandfather clause" as still protecting consumers (Pet. 4) (italicized words) actually refers broadly to the entire "final rule" and not specifically to BATF's (unexplained) creation of a "grandfather clause."⁴

⁴ Petitioners' assertion that BATF set a lower standard for "existing geographic brand names" because it believed that consumers "understood that the brand names did not identify the wine's origin" (Pet. 4) is wholly

BATF continues to acknowledge the States' concurrent authority to regulate wine labeling, including through stricter regulations than BATF has imposed. In 1993, BATF specifically approved a California regulation requiring that 100% of the grapes in wine with a "California" appellation be grown in the State, even though federal regulations expressly permit a State appellation of origin where only 75% of the grapes are grown there. *See* 58 Fed. Reg. 65,295 (Dec. 14, 1993).

BATF-Issued COLAs Show Only Compliance with Federal Regulations

BATF prohibits bottling or distribution of wine in interstate commerce unless BATF has issued a COLA for the wine. A COLA, by BATF's own proclamation, indicates only compliance with specific federal laws and regulation. BATF's COLA form (TTB F5100.31 (2-2003)) reads in pertinent part: "We collect this information to verify your compliance with the *Federal* laws and regulations we administer for the labeling of alcoholic beverages" (emphasis added).

In its Final Rule concerning revocation of COLAs, BATF reiterated this point.

The certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder. On the contrary, Paragraph 1 of Form 5100.31 provides that "This certificate is issued for ATF use only" The certificate of label approval is a statutorily mandated tool used to help ATF in its enforcement of the labeling requirements of the *FAA Act*.

64 Fed. Reg. 2122, 2123 (Jan. 13, 1999) (emphasis added); *see also Boller Beverages, Inc. v. Davis*, 183 A.2d 64, 69 (N.J. 1962) ("[A COLA] goes no further than evidencing

specious and not supported by BATF's rulemaking notice. To the contrary, BATF specifically found that geographic brand names *did* indicate the wine's origin and that the use of an accurate appellation of origin was insufficient to correct the misimpression created by geographically mis-descriptive brand names. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986).

compliance with [federal regulatory] standards imposed only for the purposes mentioned in the valid exercise of federal authority.”).

BATF’s labeling staff does not make any individualized determination that “grandfathered” brand names are not misleading before issuing COLAs. It merely confirms that the use of “grandfathered” brands complies with the grandfather clause. App. 70a; 27 C.F.R. § 4.39(i). The record contains no evidence that BATF specifically concluded that Bronco’s misdescriptive “Napa” labels do not mislead consumers. The issuance of such COLAs therefore is not an indication that States cannot impose more stringent labeling requirements.

B. Bronco’s Misleading Use of Napa Brand Names.

For well over a century, Napa County has been known for producing the finest and most prestigious wines in the United States. Its reputation is attributable in large part to the distinctiveness and uniformly high quality of the grapes grown there. Petitioners make wines from grapes grown *not* in Napa County but in other areas where the cost of grapes and their quality are considerably lower. Bronco then sells its wines under Napa brand names—Napa Ridge, Napa Creek and Rutherford Vintners⁵—that mislead consumers into believing that the wine is made from the higher-quality and higher-priced grapes grown in Napa County.⁶

⁵ Bronco has attempted to exploit the “grandfather clause” and create an unanticipated market in non-Napa wines using Napa brand names. Bronco purchased the Napa Creek brand in 1993 and the Rutherford Vintners brand in 1994. App. 3a. All of the wines marketed by the prior owner under the Napa Creek brand and most wines marketed by the prior owner under the Rutherford Vintners brand had been made from Napa County grapes. *Id.* at 3a-4a.

⁶ Bronco has a history of misdescribing its wine to consumers. See *Bronco Wine Co. v. U.S. Dep’t of Treasury*, 997 F. Supp. 1309, 1317 (E.D. Cal. 1996) (upholding federal regulators’ action prohibiting Bronco from wrongly using its Rutherford Vineyards brand name for wine not made from grapes grown in Rutherford). Moreover, Bronco pleaded *nolo*

Bronco prominently features its Napa brand names on the front labels of its wines, followed at the bottom of the label and in smaller lettering by the appellation of origin. Representative front labels of Bronco's wines are included in the California Court of Appeal's December 18, 2002 decision. App. 134a. The back label of each states that the wine was "vinted and bottled" in "Napa, CA" or in "Napa, California." In addition, many of the Napa Ridge wines include the word "Napa" on the bottleneck collar label, and some include that word on branded corks.

In furtherance of its long-established role in regulating wine produced within the State, and in the face of Bronco's practice of purchasing "grandfathered" Napa brand names to produce and market wines made from non-Napa grapes, the California Legislature in 2000 addressed the problem of the misleading use of Napa brand names by enacting § 25241 of the California Business and Professions Code.⁷ The Legislature held hearings and received substantial public comment which revealed that consumers were misled by wines that bore Napa brand names but were made from non-Napa grapes.⁸ App. 4a, 85a-86a. The testimony and public com-

contendere, and its owner, Fred Franzia, pleaded guilty to federal fraud charges for deceptively passing off less expensive grapes as Zinfandel grapes from 1987 to 1992. Bronco and Franzia were fined heavily, and Franzia was banned for five years from sitting on Bronco's board of directors or from holding a position with responsibility for compliance with federal wine regulations. NVVA App. 358-400, filed Feb. 28, 2001, Cal. Ct. App., in present case.

⁷ In addition to Bronco's Napa brand names, there are 32 other Napa-related "grandfathered" brands that could be used to deceive consumers into buying Napa-branded wines not made from Napa grapes. NVVA App. 227-28, filed Feb. 28, 2001, Cal. Ct. App., in present case.

⁸ The Legislature also received evidence of Bronco's future intent or willingness to sell its geographically misdescriptive Napa brands on a far greater scale, as indicated by its completion of a facility in the City of Napa, Napa County, that is capable of producing approximately 18

ment were not just from Napa Valley vintners and growers, but also from consumers, retailers, and others. *Id.* at 86a n.10. In addition to this evidence, the Legislature considered a survey indicating that Napa brand names for wine made from non-Napa grapes are deceptive and confusing to consumers.⁹ Based on the evidence, the Legislature found that "certain producers are using Napa appellations on labels . . . for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices." Cal. Bus. & Prof. Code § 25241(a)(2). Concluding that legislation was necessary to eliminate these misleading practices, the Legislature declared its "intent . . . to assure consumers that the wines produced or sold in the state with brand names . . . referring to Napa appellations in fact qualify for the Napa County appellation of origin." *Id.* § 25241(a)(3).

In furtherance of that objective, § 25241(b) provides that no wine produced or marketed in California shall use a brand name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless the wine qualifies for, and includes, the appellation Napa County or the appellation of a viticultural area located entirely within Napa County. Pursuant to federal regulations, a wine does not qualify for a county appellation of origin unless at least 75 percent of the grapes are from that county, 27 C.F.R. § 4.25(b)(1), and does not qualify for a viticultural

million 12-bottle cases a year—output that would be more than double the current annual production of all Napa-grown wines. App. 4a n.4.

⁹ The survey showed that 99 percent of those interviewed thought a wine with the brand name "Napa Valley Caves" was from Napa Valley; 81 percent believed it was confusing if the brand name included the word "Napa" but the wine was not sourced with Napa grapes; 91 percent felt it was deceptive to use a brand name based on geographic region known for wine when the wine was made with grapes from another region; and 82 percent indicated the brand name is important when purchasing wine. App. 88a n.17.

area appellation of origin unless at least 85 percent of the grapes are from that area, *id.* § 4.25(e)(3)(ii).

Section 25241 therefore prohibits wine producers like Bronco from misleading consumers by selling wine made from non-Napa grapes under Napa brand names. It does not, however, prohibit anyone from using Napa brand names to sell wine made from Napa grapes. Nor does it prohibit anyone from using non-Napa grapes to sell wine under any non-Napa brand name.

C. Bronco's Unsuccessful State Court Action and the California Supreme Court's Unanimous Decision.

Bronco filed an original petition for a writ of mandate in the California Court of Appeal seeking to prohibit the California Department of Alcohol Beverage Control (the "Department") and its director from enforcing § 25241 with respect to Bronco's wines on the ground that the statute violated the First Amendment, Supremacy Clause, Commerce Clause, and Takings Clause of the United States Constitution. Intervenor Napa Valley Vintners Association ("NVVA") joined with the Department in defending the validity of the statute. The Court of Appeal held that § 25241 is preempted by federal law but did not reach the other federal law issues.

The California Supreme Court granted review and, addressing only the preemption issue, unanimously reversed the judgment of the Court of Appeal. Speaking for the court, Chief Justice George rejected every aspect of Petitioners' preemption argument. The California Supreme Court concluded that protection of consumers against misleading brand names and labels was a subject that traditionally had been regulated by the States and that it was therefore appropriate to apply the presumption against preemption. App. 14a. It held that § 25241 was not preempted because the objective of the FAA Act and BATF's federal regulations was to supplement, not supplant, State regulation and BATF had long operated on

the understanding that States may and would continue to impose their own stricter wine labeling regulations. *Id.* 64a-67a.

The California Supreme Court also rejected Bronco's claim that a federal COLA is the equivalent of a federal right, license, or permit to market wine in interstate commerce. *Id.* 67a-70a. It noted that neither Congress nor BATF has ever so implied, and that, to the contrary, a COLA signifies nothing more than compliance with federal labeling law and does not exempt the COLA holder from State laws. *Id.* 70a. The Court therefore remanded the case to the Court of Appeal to consider Bronco's remaining federal claims.

Petitioners thereafter filed a petition for certiorari with this Court, seeking review of the California Supreme Court's unanimous preemption holding and raising the same arguments presented in the instant petition. Respondents opposed the petition, arguing that the California Supreme Court's decision was correct and that the decision was not final under 28 U.S.C. § 1257. This Court denied the petition. See 125 S. Ct. 1646 (Mar. 21, 2005).

California Court of Appeal's Decision on Remand

On remand, the California Court of Appeal unanimously upheld the constitutionality of § 25241. The Court of Appeal found that § 25241 does not violate the First Amendment because the statute is "a regulation of deceptive and misleading commercial speech that is not entitled to First Amendment protection." App. 80a; *id.* 81a-96a. The Court of Appeal also rejected Petitioners' claims under the Commerce and Takings Clauses of the Constitution.

Petitioners then filed a petition for review in the California Supreme Court, contending that the Court of Appeal erred in concluding that § 25241 did not violate the First Amendment or the Commerce Clause. The California Supreme Court denied the petition. App. 172a.

REASONS FOR DENYING THE WRIT

I. The California Supreme Court's Holding that Federal Law Does Not Preempt § 25241 Raises No Issue Meriting This Court's Review.

The California Supreme Court's decision presents a straightforward application of well-settled principles of preemption law. Petitioners do not contest (i) that the FAA Act and regulations do not expressly preempt State wine labeling laws; (ii) that the FAA Act and regulations do not "occupy the field" of wine labeling regulation; and (iii) that compliance with both federal law and § 25241 is possible. See Pet. 11. They argue instead that § 25241 is preempted because it allegedly frustrates the objectives of BATF's so-called "grandfather clause," 27 C.F.R. § 4.39(i)(2), and the COLAs issued to Petitioners under that regulation. Pet. 11-16. Petitioners also argue that the California Supreme Court erred in applying a presumption against preemption, Pet. 16-23, even though wine labeling is a field traditionally occupied by the States.

A. Neither BATF's "Grandfather Clause" Nor Any COLA Preempts Stricter State Regulation of Misleading Wine Labels.

In rejecting Petitioners' arguments, the California Supreme Court applied the standard this Court consistently applies in such cases. App. 9a-10a. It asked whether "under the circumstances of this particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941),¹⁰ and concluded it did

¹⁰ *Accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

not. Petitioners' contention that the court's conclusion is incorrect, Pet. 11, is not an adequate basis for granting certiorari. See U.S. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

In any event, the California Supreme Court correctly decided the preemption issue. It is beyond dispute that the overriding purpose of the FAA Act and the BATF regulations is to prevent consumer deception in labeling of alcoholic beverages. App. 64a-65a. Section 25241 furthers that very objective. The California Legislature found that labels like those of Petitioners, whose Napa brand names belie their non-Napa contents, mislead consumers and therefore enacted § 25241 to ban their use on wines produced in the State. App. 4a. The California Supreme Court thus correctly concluded that the federal statute and regulations and the California statute serve harmonious purposes. App. 65a.

1. *The federal "grandfather clause" does not preempt § 25241.*

Contrary to Petitioners' suggestion, BATF's "grandfather clause" cannot fairly be construed as a federal authorization to employ labels that confuse and deceive consumers regarding the contents of the wine—in essence, a license to mislead—and to do so free from State interference or regulation. Such a construction cannot possibly be reconciled with the overriding federal policy of the FAA Act: to prevent wine producers from misleading consumers. In promulgating its 1986 labeling regulation, BATF expressly found that geographic brand names necessarily convey to consumers the source of the grapes used to make the wine and thus the inclusion of a correct appellation of origin on the label does not dispel the confusion created by a geographically misdescriptive brand name. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986). There is simply no indication that BATF intended to prevent States from banning the use of geographically misdescriptive

labels that mislead consumers regarding the source of the grapes used to make the wines.

BATF's 1986 regulation merely sets minimum federal standards for use of geographic brand names on wine labels. Brands in use after July 7, 1986 are subject to one standard (§ 4.39(i)(1)); brands in use prior to that date are subject to a less stringent standard (§ 4.39(i)(2)). But in setting these federal minima, the regulators nowhere indicated an intent to preclude stricter State standards—whether for grandfathered or non-grandfathered brands. *See supra* pp. 5-6, 8. To the contrary, as the California Supreme Court observed, "BATF long has been aware of these stricter state law brand-name labeling regulations, and, far from suggesting that their enforcement would frustrate any federal purpose, . . . BATF has stated its understanding that such labeling regulation will be enforced by the states." App. 65a-66a (footnote omitted). When amending its labeling regulations only a few months before the "grandfather clause" was put into effect, BATF recognized, "State laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved." 51 Fed. Reg. 3773, 3774 (Jan. 30, 1986).

As the California Supreme Court unanimously found, the record is entirely devoid of evidence supporting Petitioners' contention that the BATF regulation was intended to preempt State regulations. "We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general* matter its grandfather clause was appropriate so as to avoid destroying an 'entire class' of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a.

A federal law establishing certain minimum standards does not imply that States are precluded from applying more stringent standards when the federal government has not occupied the field or otherwise indicated an intent to preempt. See *Hillsborough County*, 471 U.S. at 721 (more stringent local ordinance related to health and safety not preempted by federal regulations when federal regulators expressed intent not to displace state law); see also *Sprietsma*, 537 U.S. at 67 (though federal decision not to regulate was "intentional and carefully considered," it failed to convey an authoritative message of federal policy preventing States from regulating).

More specifically, by excluding certain behavior from a more general prohibition—as BATF did here when it imposed lower minimum standards on "grandfathered" brand names—the federal government does not thereby preclude stricter state regulation of that behavior. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132 (1978) ("[I]t is illogical to infer that by excluding certain . . . behavior from [a] general ban . . . , Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion."); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) ("A finding of preemption is particularly inappropriate when the state is regulating conduct permitted by federal regulation, but only as an exception to a broad federal prohibition."), quoted in *Malabed v. N. Slope Borough*, 335 F.3d 864, 872 (9th Cir. 2003); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996) (federal grandfather provisions not intended to displace status quo allowing State-law negligence claims).

The cases relied on by Petitioners are readily distinguishable because each involved a clear federal policy to preclude State interference with a federal program or instrumentality. In *Crosby*, for example, the Court found that Congress did not intend to delegate to the States any aspect of its carefully calibrated policy regarding relationships with Burma. 530 U.S. at 377-78. In *Geier*, the Court discerned a federal policy

of fostering experimentation and innovation in the development of passive restraint devices without interference by the States. 529 U.S. at 880-81. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), a federal statute expressly empowered national banks to sell insurance. Cf. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (holding that a federal regulation stating "that a federal savings and loan 'continues to have the power' to include a due-on-sale clause in a loan instrument and to enforce that clause 'at its option'" preempted a state prohibition on due-on-sale clauses).¹¹ None of these decisions dictates, or even supports, federal preemption of State regulation of wine labeling.

2. Federal COLAs do not preempt § 25241.

Petitioners additionally claim that California's § 25241 is unlawful because it "impair[s] the exercise of a license or permit issued under a federal regulatory scheme"—to wit, a COLA. Pet. 12. Petitioners' argument—which would invalidate *every* State labeling law that exceeds federal requirements—fundamentally misapprehends the nature and purpose of COLAs issued by BATF.

As the California Supreme Court noted, "nowhere in the separate COLA procedures set forth in [the FAA Act], or the extensive COLA regulations, does Congress or the BATF even *imply* that a COLA constitutes a license or permit. Quite the contrary." App. 69a (citations omitted). BATF has explained that a COLA "was never intended to convey any type of proprietary interest to [its] holder." 64 Fed. Reg. 2122, 2123 (Jan. 13, 1999). It "is issued for [B]ATF use only." *Id.* Consistent with the dual scheme of regulation, BATF's COLA application form specifies that the informa-

¹¹ Another case relied on by Petitioners, *McDermott v. Wisconsin*, 228 U.S. 115, 133-34 (1913), invalidated a State labeling law that required physical removal of labels meeting federal specifications, thereby frustrating federal officials' ability to ensure compliance with federal law.

tion can be shared with State regulators “to aid in the performance of their duties.” App. 69a (citation omitted). A COLA therefore demonstrates only that a particular wine label satisfies the federal government’s minimum requirements; it does not exempt the label from additional State regulation.

This Court repeatedly has recognized that States may impose additional regulations even after an entity has obtained a certificate of compliance with federal regulations. *See, e.g., Medtronic*, 518 U.S. 470; *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190 (1983). That is all that has happened here—California has imposed a stricter labeling requirement than federal law mandates, and producers now must comply with both.

B. The California Supreme Court’s Application of the Presumption Against Preemption Is Consistent with Decisions of This Court and the Federal Courts of Appeals.

Petitioners pose the question “whether the presumption against preemption ever applies in conflict preemption cases and whether, if it does, evidence of preemptive intent on the part of Congress or a federal agency is necessary to avoid or overcome the presumption.” Pet. 20-21. As an initial matter, as shown above, even without applying the presumption, there is no preemption in this case because § 25241 does not stand as an obstacle to federal purposes. *See supra* Part I.A. Because the California Supreme Court came to the same conclusion, App. 64a-66a, its decision did not turn on application of the presumption. Thus, this is not an appropriate case for reviewing the presumption’s application. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (declining to review a state-court judgment because “if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than

an advisory opinion"). In all events, the California Supreme Court properly applied the presumption against preemption.

1. *The Presumption Applies Where, as Here, the State Has Traditionally Occupied the Field To Be Regulated.*

For at least a hundred years, this Court has recognized that a presumption against preemption applies when Congress legislates in a field traditionally occupied by the States. See, e.g., *Bates v. Dow Agrosiences LLC*, 544 U.S. ___, 125 S. Ct. 1788, 1801 (2005); *New York v. FERC*, 535 U.S. 1, 17-18 (2002); *Cipollone v. Liggett Group*, 505 U.S. 504, 516, 523 (1992); *id.* at 532 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *Hillsborough County*, 471 U.S. at 715; *Savage v. Jones*, 225 U.S. 501, 537 (1912); *Reid v. Colorado*, 187 U.S. 137, 148 (1902).¹² As the Court has explained:

In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*; *Hillsborough Cty.*, 471 U.S. at 715-716; cf. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987).

Medtronic, 518 U.S. at 485 (alterations in original).

The California Supreme Court thus properly applied the presumption against preemption because, as it correctly found, protecting consumers from misleading brand names and

¹² See also *Allen-Bradley Local No. 1111 v. Wis. Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (stating that the Court had "long insisted that an intention of Congress to exclude States from exerting their police power must be clearly manifested" (emphasis added; internal quotation marks omitted)).

labels on alcoholic beverages, including wine, historically has been regulated by the States through the exercise of their traditional police powers. App. 14a. *See supra* pp. 2-3.

2. This Court Has Recognized the Presumption in Conflict-Preemption Cases.

Petitioners wrongly assert that this Court has refused to apply the presumption against preemption in cases involving a claim of implied conflict preemption. The very opposite is the case. *See, e.g., Hillsborough County*, 471 U.S. at 716 (“Appellee must . . . present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.”). In *New York v. FERC*, this Court recently made clear that a presumption applies in conflict preemption cases: “The Court has most often stated a ‘presumption against pre-emption’ when a controversy concerned . . . whether a given state authority *conflicts with*, and thus has been displaced by, the existence of Federal Government authority.” 535 U.S. at 17-18 (emphasis added) (quoting *Hillsborough County*, 471 U.S. at 715).¹³ The decision below is fully in accord with this Court’s decisions.

Petitioners’ lengthy quotation from *Geier*, Pet. 16-17, reflects nothing more than the Court’s refusal to require “an *express* statement of pre-emptive intent.” *Geier*, 529 U.S. at

¹³ The Court in *Crosby* did not, as Petitioners claim, Pet. 18, raise any question about the general applicability of the presumption in conflict preemption cases. 530 U.S. at 374 n.8. Rather, it merely deferred the question of the presumption’s application in the specific “context” of that case, which concerned international relations. *Id.* (citing *United States v. Locke*, 529 U.S. 89, 108 (2000)). In any event, the Court has since reaffirmed the applicability of the presumption in conflict-preemption cases. *See New York v. FERC*, 535 U.S. at 17-18; *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

884 (emphasis added). That refusal, however, has no bearing on whether a presumption against preemption applies and is irrelevant here, where the California Supreme Court did not require such an express statement of preemptive intent by Congress or BATF.¹⁴ Indeed, the Court in *Geier* did not address the presumption against preemption other than to *acknowledge* its existence, stating: "While we certainly accept the dissent's basic position that a court should not find preemption too readily in the absence of clear evidence of a conflict, for the reasons set out above, we find such evidence here." *Geier*, 529 U.S. at 885 (internal citation omitted).

3. *The Federal Courts of Appeals Have Recognized the Presumption in Conflict Preemption Cases.*

The California Supreme Court's decision is also consistent with decisions of the federal Courts of Appeals, including the Fifth and Eleventh Circuits. Petitioners' attempt to demonstrate a conflict among the Circuit courts misapprehends the case law.

The Fifth Circuit applies the presumption against preemption, including in conflict preemption cases. See *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005) (stating, in obstacle-preemption case, that court starts with presumption that state statute is valid); *Astraea Aviation Servs., Inc. v. Nations Air Inc.*, 172 F.3d 390, 395 (5th Cir. 1999) (holding the plaintiff "must overcome the presumption against preemption," where state regu-

¹⁴ Notably, Justice Breyer, the author of the Court's opinion in *Geier*, expressly acknowledged in a subsequent opinion that when, as here, the question is whether a State statute stands as an obstacle to congressional purposes, "we must remember that petitioner has to overcome a strong presumption *against* pre-emption." *Egelhoff*, 532 U.S. at 157 (Breyer, J., dissenting) (emphasis in original). The Court in *Egelhoff* similarly acknowledged that "[t]here is indeed a presumption against pre-emption in areas of traditional state regulation." *Id.* at 151 (majority opinion).

lation allegedly would “thwart the policy behind [the] federal regulation”).¹⁵

Similarly, in a case raising both express and implied conflict preemption, the Eleventh Circuit recently stated: “When we consider issues that arise under the Supremacy Clause (i.e., preemption issues), we start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004);¹⁶ see also *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327-28, 1329 n.3 (11th Cir. 2001) (starting with “the basic assumption that Congress did not intend to displace state law” and finding that the state law did not stand as an obstacle to congressional objectives (quotation marks omitted)).

The older Eleventh Circuit decisions cited by Petitioners have been superseded by more recent decisions. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997)—on which the later decision cited by Petitioners relies, see *Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002)—are no longer good law in light of subsequent decisions. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55 n.3 (2002); *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521-22 (11th Cir. 1994), *aff’d sub nom. Freightliner*

¹⁵ The Fifth Circuit did not, as Petitioners claim, “reject[] the notion that plaintiffs had to show preemptive intent,” Pet. 17, in *Wells Fargo Bank v. James*, 321 F.3d 488 (5th Cir. 2003). Rather, the *Wells Fargo* court started with the premise that in assessing preemption the “paramount concern is to effectuate the intent of Congress,” *id.* at 491, but held that where preemption is based on an agency regulation, the court must determine whether the agency had authority to supplant state law, *id.* at 493.

¹⁶ Contrary to Petitioners’ suggestion, Pet. 19, the *Cliff* court did not limit this principle to field preemption, as opposed to conflict preemption. 363 F.3d at 1122.

Corp. v. Myrick, 514 U.S. 280 (1995). In *Myrick*, 13 F.3d at 1521-22, the Eleventh Circuit explicitly acknowledged the applicability of the presumption against preemption: "In the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *Id.* at 1524 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (alterations in original).

4. *The California Supreme Court Did Not Apply the Presumption in a Field Traditionally Occupied by the Federal Government.*

Petitioners next argue that any presumption should not apply where there has been a history of significant federal regulation. Pet. 21. After an exhaustive review of the history of both federal and State regulation, App. 15a-59a, however, the California Supreme Court unanimously concluded that there was historically "very little federal regulation," of food and beverage labeling, including alcoholic beverage labeling, *id.* at 11a, and that "the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states," *id.* at 14a.

Unable to refute the California Supreme Court's detailed analysis, Petitioners attempt to turn a footnote into a basis for certiorari. Petitioners grossly distort the court's opinion by arguing that it "require[d] proof of a substantial federal presence dating back to the 'beginning of our Republic' to avoid application of the presumption against preemption." Pet. 22. Not so. The court below merely quoted in a footnote from *United States v. Locke*, 529 U.S. 89, 99 (2000), on which Petitioners had relied and which involved a field in which the federal government's role had, in this Court's words, dated

from “the beginning of our Republic.” It nowhere indicated that such a showing was necessary to defeat a presumption against preemption.

II. Bronco’s First Amendment Challenge Does Not Warrant Review.

The California Court of Appeal’s decision is based on the well-settled principle that false and misleading speech is not protected by the First Amendment. Bronco’s brand names convey objectively false information—that the wine is made with Napa-grown grapes when, in fact, it is not—and thus are not protected by the First Amendment. This case raises no controversial, new, or even difficult issues that merit this Court’s review.

A. There Is No Conflict Among the Courts: False and Misleading Commercial Speech Is Not Protected by the First Amendment.

It has long been settled that false, inaccurate, or misleading commercial speech is accorded no protection under the First Amendment. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). As this Court explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980): “The First Amendment’s concern for commercial speech is based on the informational function of advertising.” *Id.* at 563. No protection exists for commercial speech if it does “not accurately inform the public.” *Id.* at 563. Thus, to come within the ambit of the First Amendment, commercial speech “at least must concern lawful activity and not be misleading.” *Id.* at 566. “The government may ban forms of communication more likely to deceive the public than to inform it.” *Id.* at 563 (internal citation omitted).

There can be no serious dispute that Bronco uses its Napa brand names to convey inaccurate information to consumers.

Even Bronco has described its Napa brand names as “geographically misdescriptive.” Cal. Pet. 9.¹⁷ Bronco argues that they are nonetheless protected speech. But the Court’s post-*Central Hudson* cases discussing truthful, but “potentially misleading” speech did not alter the basic principle that inaccurate commercial speech lacks First Amendment protection and may be prohibited.¹⁸ As the Court explained in *In re R.M.J.*, 455 U.S. 191 (1982):

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading *or when experience has proved that in fact such advertising is subject to abuse*, the States may impose appropriate restrictions.

Id. at 203 (emphases added). Bronco ignores entirely the States’ right to restrict commercial speech when experience has proved it to be subject to abuse or actually misleading in practice, *id.* at 202, 203, 207—as the Legislature found to be the case with respect to Napa brand names, App. 4a, 85-86a.

¹⁷ “Cal Pet.” refers to Petitioners’ July 6, 2005 Petition for Review before the California Supreme Court.

¹⁸ See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994) (holding that “[b]ecause ‘disclosure of *truthful*, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,’” such information may not be banned, but “false, deceptive, or misleading commercial speech may be banned”) (emphasis added; quoting *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 108 (1990)); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988) (“Commercial speech that is *not* false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.”) (alteration in original; quoting *Zauderer*, 471 U.S. at 638); *Zauderer*, 471 U.S. at 638 (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading”); *In re R.M.J.*, 455 U.S. at 203 (“Misleading advertising may be prohibited entirely.”).

The cases on which Bronco relies regarding speech that is merely "potentially misleading" are fundamentally different from this case because they all involved attempts to convey *accurate* information, which is protected by the First Amendment, unlike Bronco's false and misleading brand names.¹⁹ The *R.M.J.* Court's discussion of "potentially misleading" speech that "may be presented in a way that is not deceptive," 455 U.S. at 203, makes clear that the Court is describing *accurate* speech that has the potential to mislead, such as "a listing of areas of practice." *Id.* Because the speech at issue in these cases was accurate, it fulfilled the informational function of the First Amendment, and thus was protected even though it had the potential to mislead.

Bronco's heavy emphasis on the "presumption favoring disclosure over concealment," Pet. 23-24, is similarly misplaced. That presumption has no role in cases where, as here, the "conceal[ed]" speech is itself false and misleading; rather, the "concealment" to be avoided is of *accurate* information. As explained by this Court:

[D]isclosure of *truthful*, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. Even if we assume that petitioner's [speech] may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of *accurate* factual information to the public.

¹⁹ See *Ibanez*, 512 U.S. at 138 (addressing "truthful" representation that an attorney was a Certified Public Accountant and a Certified Financial Planner); *Peel*, 496 U.S. at 100-101, 106 (addressing prohibition on attorney letterhead that stated the "true and verifiable" fact of certification by the National Board of Trial Advocacy); *Zauderer*, 471 U.S. at 639, 651-52 (addressing "entirely accurate" attorney advertisement regarding Dalkon Shield claims); *Bates*, 433 U.S. at 372-73, 384 (addressing "whether the State may prevent the publication in a newspaper of appellants' truthful advertisement").

Peel, 496 U.S. at 108-09 (emphasis added & internal citations omitted).

Nor is there any conflict in the Circuits or State courts. Pet. 26-27. The cases from New York and the Tenth Circuit that Bronco cites in fact reiterate the principle that false and misleading speech receives no First Amendment protection. See *Revo v. Disciplinary Bd. of the Supreme Court*, 106 F.3d 929, 932 (10th Cir. 1997); *In re von Wiegen*, 470 N.E.2d 838, 843 (N.Y. 1984). Like the cases above, they apply First Amendment protection to the dissemination of *accurate* information, and do not suggest that false or misleading speech is protected. See *Revo*, 106 F.3d at 931 n.2, 932 (addressing ban on direct mail solicitation by attorneys and finding letters at issue were not misleading); *In re von Wiegen*, 470 N.E.2d at 838 (invalidating general prohibition on direct mail solicitation by attorneys, but finding that letters at issue were misleading, could be prohibited, and "there was no need to establish that the letters actually mislead the recipients").²⁰

False or misleading speech is not entitled to First Amendment protection, as Bronco suggests, simply because the speaker can simultaneously contradict it. Pet. 27. If potentially misleading speech is clarified to convey accurate and non-misleading information, then the clarified, accurate information is entitled to First Amendment protection. However, this Court has never held that disclaimers are adequate to cure false or misleading commercial speech. Here, the Court of Appeal properly found that the use of Napa brand names for non-Napa wine is not protected by the First Amendment.

²⁰ *Pearson v. Shalala*, also relied on by Bronco, Pet. 26, likewise addressed the dissemination of information that was not false, but merely had the potential to mislead. 164 F.3d 650 (D.C. Cir. 1999) ("The government does not assert here that appellants' health claims convey *no* factual information, only that the factual information conveyed is misleading." (emphasis in original)).

B. The Court of Appeal Did Not Defer Too Much to the California Legislature Nor Too Little to BATF.

Bronco argues that the California Court of Appeal “wrongly deferred heavily to the California Legislature’s” finding that Bronco’s brand names are misleading, Pet. 27-28. In fact, the Court of Appeal did not “defer” to the Legislature’s findings, but rather analyzed whether they were “supported by an adequate factual basis,” App. 85a. The court found that they were. *Id.* at 85a-86a. In coming to this conclusion, the court thoroughly reviewed the Legislature’s findings, the BATF regulatory history, regulations from other states, and the evidence submitted by the parties. App. 86a-92a. Bronco’s characterization of the court’s decision as “defer[ring] heavily” (Pet. 27) to the Legislature is simply incorrect.

Bronco’s description of the decision below as “effectively disregard[ing]” (Pet. 28) the regulatory history also is wrong. The court expressly considered the regulatory history, App. 88a-90a, including the fact that “[f]ederal regulators have also found that brand names of viticultural significance are misleading when the brand name does not accurately reflect the wine’s true origin,” App. 88a-89a. The Court of Appeal correctly concluded that there was no “finding” that labels with grandfathered brand names were not misleading. App. 89a-90a; *see also supra* p. 9.

In any event, Bronco admits that federal regulatory findings “do not automatically ‘override’ the [State] Legislature’s contrary determination,” but fails to explain what the court should have done differently to “defer” appropriately, other than simply acquiesce in the alleged contrary determination of the regulators. Pet. 30. Nor does Bronco explain why such deference would be proper when, as it also argues, the court must exercise *de novo* review. Pet. 28. Bronco essentially argues that an agency’s failure to prohibit speech accords it special status under the First Amendment. As discussed above, *supra* pp. 14-19, however, nothing in the

federal regulations prevents, states "from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a. Unlike BATF, the California Legislature heard evidence on the specific issue of Napa brand names, found that Napa brand names are misleading if the wine is not made from Napa grapes, and further found that these labels pose a particular concern because of the well-known reputation of the Napa region for premium wines. Cal. Bus. & Prof. Code § 25241(a); App. 4a, 85a-86a. The misleading labeling of Napa wines is thus a classic example of "when experience has proved that in fact such advertising is subject to abuse," and California's § 25241 is an appropriate restriction. *R.M.J.*, 455 U.S. at 203. California plainly has the ability to regulate such misleading brand names, despite BATF's failure to do so, or any federal failure to regulate would hamstring the States' ability to address local concerns.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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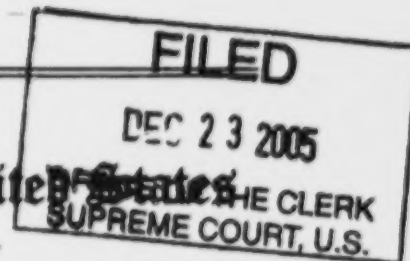
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December 23, 2005

No. 05-653

**In The
Supreme Court of the United States**



**BRONCO WINE COMPANY and
BARREL TEN QUARTER CIRCLE, INC.,**

Petitioners,

v.

**JERRY R. JOLLY, Director of the California
Department of Alcoholic Beverage Control;
CALIFORNIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL; and the
NAPA VALLEY VINTNERS ASSOCIATION,**

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The
State Of California**

**BRIEF FOR RESPONDENTS JERRY R. JOLLY,
DIRECTOR OF THE CALIFORNIA DEPARTMENT
OF ALCOHOLIC BEVERAGE CONTROL AND THE
CALIFORNIA DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL IN OPPOSITION**

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QUESTIONS PRESENTED

- I. Whether a California statute prohibiting wine producers from mislabeling non-Napa wine as Napa wine is impliedly preempted by federal regulations.
- II. Whether a statute prohibiting as false and misleading the mislabeling of non-Napa wine as Napa wine violates the First Amendment.

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STATEMENT OF THE CASE

No one doubts that Napa County is the most famous wine-growing region in the United States and the crown jewel of California's multi-billion dollar wine industry.¹ This case represents petitioners' (collectively "Bronco") second attempt before this Court to secure a shield against regulation of their deceptive labeling of non-Napa wine as Napa wine.² In a unanimous opinion, the California Supreme Court rejected Bronco's claim of preemption. Chief Justice George wrote that "we find nothing in the history of the underlying federal statute or the federal regulations suggesting that . . . states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a. A unanimous California Court of Appeal rejected Bronco's First Amendment claim, holding that the First Amendment secures no right to label wine with a brand name falsely suggestive of a Napa County origin.³

Modern federal wine regulations prohibit wine producers from using brand names of viticultural significance "unless the wine meets the appellation of origin requirements for the geographic area named." 27 C.F.R.

¹ In California, by 1860 grapes ranked as one of the "three major agricultural products of the state," along with wheat and barley. VINCENT P. CAROSSO, *THE CALIFORNIA WINE INDUSTRY: A STUDY OF THE FORMATIVE YEARS* (1951) p. 74.

² While Napa-grown grapes are the most costly in the State, Bronco's subject wines are typically made from the least expensive grapes available in all of California. App. 87a.

³ The Court of Appeal also rejected Bronco's dormant Commerce Clause and Fifth Amendment Takings Clause arguments, but Bronco has abandoned those claims.

§ 4.39(i)(1).⁴ Thus, to be entitled to use a state or county appellation of origin in a brand name, at least 75 percent of the wine must be made from grapes in the named appellation, or, if an American Viticultural Area (AVA) is named, the percentage requirement rises to 85%. 27 C.F.R. §§ 4.25a(b)(1)(iii) & 4.25a(e)(3). If these compositional requirements are not met, **the federal regulations simply prohibit the use of a brand name of viticultural significance**, no matter what disclaimers might be appended elsewhere on the labeling regarding the identity and origin of the wine. The federal agency, the Bureau of Alcohol, Tobacco & Firearms⁵ (BATF), has spoken clearly regarding the rationale for this prohibition. "In the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown." 51 Fed. Reg. 20,480, 20,481 (1986).

However, 27 C.F.R. § 4.39(i)(2), commonly referred to as the "grandfather clause," exempts geographic brand names first used on wine labels before July 7, 1986, from the requirement that the wine be sourced from the named appellation. The grandfather clause was enacted by BATF with scant explanation.

⁴ For American wine, an appellation of origin can be the United States, a state, a county, a combination of two or three states or counties, or a viticultural area. 27 C.F.R. § 4.25a(a)(1). A viticultural area in turn is defined as a geographical grape growing area recognized in the federal regulatory scheme. 27 C.F.R. § 4.25a(e)(1)(i).

⁵ This brief will refer to the applicable federal agency as BATF, although its functions are now performed by the Alcohol and Tobacco Tax and Trade Bureau.

Bronco is selling wines made from non-Napa grapes under Napa brand names,⁶ a practice that would not be tolerated under the modern federal regulatory scheme (27 C.F.R. §§ 4.25a and 4.39(i)(1)) but which escapes federal prohibition by virtue of the grandfather clause (27 C.F.R. § 4.39(i)(2)). Without question, Bronco has the capacity, and apparent intention, to flood the market with wines bearing its misleading Napa brand names. In his testimony before the California Senate, Bronco's principal, Mr. Fred Franzia, confirmed that his newly-built bottling facility (petitioner Barrel Ten Quarter Circle) would have a capacity of 44.8 million gallons of wine annually (RA 014),⁷ multiples in excess of the total annual wine production of the whole of Napa County. When asked whether this increased production capacity would be used to mislead consumers into buying wine with a Napa name but made from grapes grown elsewhere, he replied: "Let me tell you what. If I could sell 18 million cases of Napa Ridge, I'd be one happy guy." RA 014. There also exist dozens of other grandfathered Napa brand names that, while now apparently quiescent, can be purchased and used at any time, whether by Bronco or others in like manner. RA 0290-0291. The risks these conditions pose to the integrity, value and stability of California's wine industry are formidable.

⁶ Bronco's grandfathered brand names are "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners." All of these grandfathered brand names, which Bronco purchased, are marketed largely as impostors on wines that are not made with Napa County grapes.

⁷ Respondents' Appendix in the California Court of Appeal is designated "RA."

It became apparent to the California Legislature that this regulatory exception was operating with intolerable and pernicious effect upon Napa County, California's uniquely famous wine-growing region. By virtue of its historic and preeminent role in the wine industry, the land, grapes, wines and name of Napa have unparalleled value. In June and August of 2000, the California Legislature held open debates and took testimony from numerous witnesses, including representatives of the Napa Valley Vintners Association, the California Retailers Association, Family Wine Makers of California, wine retailers, winery owners, and Petitioners and their attorneys. RA 1-7. The Legislature received legal memoranda supporting and criticizing the proposed statute as well as numerous communications from constituents including wine producers, retailers, the Napa County Board of Supervisors, and restaurants. RA 042-059, 153-172, 182, 198, 299, 301, 308, 320, 322, 324 and 331. The Legislature made appropriate findings:

The Legislature finds and declares that for more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively "Napa appellations") as denoting that the wine was created with the distinctive grapes grown in Napa County.

The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in

Napa County, and that consumers are confused and deceived by these practices.

The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.

Cal. Bus. & Prof. Code § 25241(a). Thus, § 25241 was enacted, forbidding the use of a Napa name unless the wine in fact qualifies for the Napa County appellation of origin under the operative provisions of 27 C.F.R. § 4.25a. Section 25241 creates a narrowly focused requirement that wines bearing Napa brand names⁸ contain real Napa wine, but it does not otherwise seek to limit the domain of the federal grandfather clause either in California or nationally. It is undisputed that Bronco can conform to both federal and state laws governing the composition of wines bearing Napa brand names. Complying with Section 25241 would not put any regulated entity in conflict with any federal requirement.

⁸ The statute applies to the name "Napa," and "[a]ny viticultural area appellation of origin . . . that is located entirely within Napa County" (§ 25241(c)). For ease of reference, we shall refer to the proscribed names collectively as "Napa names" or "Napa brand names." "No wine produced, bottled, labeled, offered for sale or sold in California" shall use the prohibited names "in a brand name or otherwise, on any label, packaging material, or advertising." § 25241(b).

REASONS FOR DENYING THE WRIT

I. THE CALIFORNIA SUPREME COURT'S HOLDING THAT NEITHER THE "GRANDFATHER CLAUSE" NOR A COLA PREEMPTS SECTION 25241 IS HARMONIOUS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

Bronco's attempt to manufacture a "conflict" ignores this Court's frequent reminders that a preemptive effect of federal law should not be lightly inferred "[f]or the State is powerless to remove the ill effects of our decision, while the federal government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). Even in construing express preemption clauses, courts must remain alert that Congress "does not cavalierly" preempt state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The Petition advances no claim of express preemption, inability to comply with both federal and California law, or field preemption. Instead, it is contended that Section 25241 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Such a conflict exists only if California's law would "seriously compromise important federal interests." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 389 (1983); *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 671 (2003) (Breyer, J., concurring). The California Supreme Court applied well-settled principles of Supremacy Clause jurisprudence in rejecting Bronco's claim.

Section 25241 does not obstruct the purposes or objectives of federal law. Thus, the California Supreme Court would have reached the same decision in rejecting Bronco's claim of preemption even without applying any presumption against preemption. In any case, its analysis of the presumption was sound. No circumstances warrant this Court's review.

A. The California Supreme Court's Decision Is Consistent With This Court's Implied Conflict Preemption Cases

In analyzing whether the minimum labeling standards promulgated in the grandfather clause were intended to foreclose supplemental state regulation, the California Supreme Court properly engaged in a searching inquiry of the history, structure and context of the federal regulation. App. 15a-59a. This approach breaks no ground and is neither incorrect nor "dangerous." The same analysis was undertaken in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), where this Court rejected a claim that the Federal Boat Safety Act of 1971 ("FBSA"), a federal act designed to "improve the safe operation of recreational boats," preempted a state tort action brought against an outboard motor manufacturer premised on the absence of a propeller guard. The FBSA had sought to establish "national construction and performance standards for boats" and to encourage "uniformity of boating laws and regulations as among the several States and the Federal Government." *Id.* 56-57. Pursuant to its delegated authority, the Coast Guard had considered and rejected a proposed propeller guard requirement, finding that the guard created some safety problems as it solved others, and was

economically unfeasible. *Id.* 61.⁹ In holding that the federal standard did not preempt state tort law liability, this Court explained that an intent to preempt stricter state standards could not be inferred from the fact that federal law authorized recreational boats to be marketed without such guards. "Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards." *Id.* 67. The California Supreme Court reached a parallel conclusion regarding the grandfather clause:

We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general matter* its grandfather clause was appropriate so as to avoid destroying an "entire class" of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns.

App. 66a.

The petition attempts to analogize the grandfather clause to the Secretary of Transportation's decision (against a monolithic federal requirement of airbags for all cars) found preemptive in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), but the comparison rings hollow. See Pet. 14. In fact, *Geier* illustrates the necessary predicate for

⁹ Thus, *Sprietsma* involved a federal rejection of the very requirement on which state law liability was premised, but the preemption challenge still failed. Here, the asserted conflict is even more illusory, as petitioners can point to no consideration and rejection of Section 25241 by either Congress or BATF.

implied conflict preemption that is so conspicuously absent here. *Geier's* holding that the state common law claim was preempted by a safety standard promulgated by the Department of Transportation did not spring from the fact that federal law authorized the subject Honda to be marketed without an airbag, as it surely did, whereas the state law claim would penalize the authorized activity. Instead, this Court exhaustively probed the purposes of the federal allowance (*id.* 875-881), and concluded that federal policy affirmatively sought experimentation with a mix of differing restraint devices to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote safety objectives." *Id.* 874-875. Allowing the state common law tort claim, which argued that all cars must have airbags to be safe (*id.* 885-886), would directly undermine these concrete federal objectives, and for that reason the federal authorization was found to be in conflict with, and to preempt, state tort liability.¹⁰

All of this Court's preemption cases cited by Bronco as in supposed "conflict" with the decision below involved the same particularized findings of interference, impairment or obstruction of federal objectives, thus starkly contrasting with the relationship between the grandfather clause and the modest supplemental regulation engendered by Section 25241. *McDermott v. Wisconsin*, 228 U.S. 115 (1913), for example, held that a Wisconsin statute was

¹⁰ This Court allowed that a more narrowly tailored airbag requirement for "some design-related circumstance concerning a particular kind of car" might well escape preemption as not posing a real threat to the federal regulation's mixed-fleet objective. *Id.* 885-886.

preempted because it required the removal of federally approved labels on syrup cans prior to their sale, thereby destroying both the government's and the shipper's ability to demonstrate compliance with federal law. *Id.* 134. In *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), this Court construed the complex state and federal power sharing scheme of the Federal Power Act to preempt a state construction permit requirement for a mammoth federal project consisting of an earthen dam, 11,000 acre reservoir and eight mile diversion canal. Requiring contractors to obtain an Iowa permit "easily could destroy the effectiveness of the federal act" given that one requirement of Iowa's Code would mandate a size reduction that the Federal Power Commission found "neither desirable nor adequate," and would impose engineering requirements that "would handicap the financial success of the project." *Id.* 157, 167. Similarly, in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), many provisions of Washington State law imposing safety standards for oil tankers operating in Puget Sound were struck down, with the Court noting that Congress sought an exclusive federal regime to control oil tanker design, and that differing state standards would frustrate the Congressional preference for uniform international standards for tank vessel construction. *Id.* 165-166 & 168.¹¹

¹¹ See also *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (federal law specifically empowered banks to sell insurance); *Leslie Miller v. Arkansas*, 352 U.S. 187, 190 (1956) (Armed Services Procurement Act preempted Arkansas law requiring state contractor's license for construction work on Air Force Base because state law would "frustrate the expressed federal policy of selecting the lowest responsible bidder."); *Sperry v. Florida*, 373 U.S. 379, 401-402 (1963) (Florida preempted from requiring state bar membership for attorneys registered to practice before United States Patent Office, as enforcement of
(Continued on following page)

By contrast, the record does not remotely reflect that Section 25241 would impair any significant federal interests or objectives, and the decision of the California Supreme Court does not conflict with this Court's decisions invalidating state laws when a true obstruction of federal objectives is discerned. The BATF has been virtually silent respecting the rationale for the grandfather clause. The Petition points to 51 Fed. Reg. 20,481 (June 5, 1986) which states: "ATF believes that the final rule will provide industry with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names." There is no indication that this comment is referring to the grandfather clause in particular, and it more logically appears connected to the immediately preceding paragraph concerning the location of the bottling winery, or to the rule regulating the use of the word "brand" in conjunction with a brand name. Certainly the grandfather clause has no impact on the "flexibility" with which wine labels can be designed.¹²

ATF believes that the brand name, usually the most prominent item on a wine label, in certain instances conveys information to the consumer. In the case of a geographic brand name of viticultural

state law would have disruptive effect on Patent Office, subjecting 50% of its practitioners to possible disqualification).

¹² Bronco's suggestion that the grandfather clause reflects a determination by BATF that the consumers of existing geographic brand names understood that the brand names were not suggestive of the origin of the wines (Pet. 4) is spun from whole cloth. The grandfather clause makes no distinction between brand names that were in use for one week versus fifty years before July 7, 1986, nor between producers having gigantic and minuscule production levels.

significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown.

51 Fed. Reg. 20,481 (June 5, 1986).

The most that can be said is that the federal agency chose not to impose the prohibitory rule on the whole class of pre-July 7, 1986 producers. Nothing in the history or structure of the FAA Act or the grandfather clause suggests that in making this election, -BATF intended to confer on each grandfathered brand name owner an immunity from state co-regulation regardless of local considerations, nor that the grandfather clause "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

B. The Application Of A Presumption Against Preemption Is Soundly Grounded In Federal Precedent

A presumption against federal preemption applies when Congress legislates in a field historically occupied by the States in the exercise of their police powers. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As expressed in *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (internal quotations and citations omitted):

When Congress legislates in a field traditionally occupied by the States, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain

that this is an area traditionally regulated by the States.

Accord, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 710 (1985).

Section 25241 is precisely the kind of state statute to which the presumption against preemption applies. The statute was enacted in furtherance of consumer protection.¹³

The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.

Cal. Bus. & Prof. Code § 25241(a).

California, having the world's fifth largest economy, has a paramount interest in regulating products produced within and emanating from its own borders. "States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). A State's police powers extend as much to preventing consumer deception

¹³ The purpose of Section 25241 is thus complementary to Congress' objectives in enacting the Federal Alcohol Administration Act to inhibit consumer deception. See 27 U.S.C. § 205. The presumption against preemption has "special force" when "the two governments are pursuing 'common purposes.'" *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 666, citing *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

as to assuring that food is healthful and safe. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146. This Court has long recognized that traditional police powers enable a State to take measures to preserve the reputation of its products and industries in other states and abroad. *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

Bronco seeks to deflect these decisions, urging categorically that any presumption against preemption evaporates in "conflict-preemption" cases (Pet. 16). *Geier* made no such pronouncement, and indeed made clear that in all cases the burden of establishing an "actual conflict" rests with the party urging preemption. "And in so concluding [that the state tort action would undermine federal objectives], we do not 'put the burden' of proving pre-emption on petitioners. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict." *Geier, supra*, at 883. This Court reiterated: "While we certainly accept the dissent's basic position that *a court should not find pre-emption too readily in the absence of clear evidence of a conflict*, (citation), for the reasons set out above we find such evidence here." *Geier, supra*, at 885 (emphasis added).

The authorities cited by Bronco do not establish any Circuit conflict on the applicability of a presumption in "conflict-preemption" cases. Pet. 18-19. The Fifth Circuit has very recently applied such a presumption in a conflict case. *Planned Parenthood of Houston & SE Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005). Its earlier decision in *Wells Fargo Bank v. James*, 321 F.3d 488, 491, 493 (5th Cir. 2003) recognized the overriding objective of effectuating the intent of Congress, and expressly confined its analysis to "the field of banking regulation."

In *Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) (citing *New York State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 421), the Eleventh Circuit observed that "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." Bronco's citation of *Cliff v. Payco Gen. Am. Credits*, 363 F.3d 1113, 1122 (11th Cir. 2004) is, at the least, inapt, as that decision proceeded from a baseline assumption that the States' police powers are not to be preempted in the absence of a clear and manifest Congressional purpose to do so. Indeed, *Cliff* ultimately turned on the Eleventh Circuit's conclusion that no conflict between federal and state law existed at all, unless the federal law was given an absurd construction that would contemplate "third-party debt collectors attempting to collect debts that are not legitimate or asserting rights that do not exist." *Id.* 1129. There is no Circuit conflict that warrants this Court's intervention.

Nor does Section 25241 operate in an arena so dominated by a federal presence that the normal operation of California's police powers should be emasculated. The California Supreme Court undertook a scholarly and painstaking examination of the history of the federal and State regulation of food and agricultural products and production, and of the wine industry and wine labeling in particular (App. 15a-59a), and its analysis leaves no doubt that Section 25241 operates in a domain that "traditionally has been regulated by the states." App. 14a.

Certainly California's regulation of wine labels deceptively suggesting a Napa origin bears no resemblance to Washington State's attempted control of oil tankers

operating in navigable waters, which reverberated to the "embarrassment from intervention of the separate States" in maritime affairs, a circumstance that "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *United States v. Locke*, 529 U.S. 89, 99 (2000).

The litany of supposedly conflicting "*Locke* exception" cases cited by Bronco provides a gossamer excuse to seek this Court's review. The cases are not in conflict. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) does not mention, much less apply, the *Locke* case. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2nd Cir. 2005) did no more than mention *Locke* in passing, and cited the uncontroversial rule that the presumption disappears "in fields of regulation that have been substantially occupied by federal authority" of which the regulation of federally chartered banks was one such field. *Id.* (citation omitted.) *Pinney v. Nokia, Inc.*, 402 F.3d 430, 454 n.4 (4th Cir. 2005) rejected applying the *Locke* exception to the wireless telecommunications area because, in contrast to maritime commerce, telecommunications featured both an absence of federal dominance and a presence of considerable State authority.

Public Util. Dist. No. 1 v. IDACORP Inc., 379 F.3d 641, 648 n.7 (9th Cir. 2004) refused to apply the presumption against preemption to the Federal Power Act of 1935 because "the federal government has long regulated wholesale electricity rates." The States were unable to regulate wholesale electrical rates, and indeed the *raison d'être* of the Federal Power Act of 1935 was that "constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated." *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 213 & n.8 (1964). In *UPS v. Flores-Galarza*, 318 F.3d

323, 336 (2003), Puerto Rico did not challenge Congress' "significant – and undisputed – presence in air transportation," but instead unsuccessfully sought to avoid the Federal Aviation Administration Authorization Act's preemption of a complex excise tax scheme that burdened interstate carriers' movement on the ground that the "relevant field" of examination was not aviation at all, but rather taxation.

These authorities conflict with neither each other nor with the California Supreme Court's decision. They provide no basis for this Court's review.

II. THE CALIFORNIA COURT OF APPEAL'S HOLDING IS CONSISTENT WITH FEDERAL AUTHORITY THAT THE FIRST AMENDMENT PROVIDES NO REFUGE FOR COMMERCIAL SPEECH THAT INHERENTLY TENDS TO MISLEAD, CONFUSE AND DECEIVE CONSUMERS

A. Bronco's "Napa Ridge," "Napa Creek Winery" and "Rutherford Vintners" Brand Names Are Inherently Misleading When Used In Wines Made From Non-Napa Grapes

Bronco contends that the First Amendment prohibits California from proscribing its deceptive marketing. False, misleading or deceptive commercial speech enjoys no First Amendment protection whatsoever. As expressed in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980) (citations omitted):

Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban

forms of communication more likely to deceive the public than to inform it. . . .

When, as here, the possibility of deception is "self-evident," this Court has held that it "need not require the State to 'conduct a survey of the . . . public before [the Court may] determine that the [advertisement] had a tendency to mislead.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985), quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965).

Bronco's subject labels underscore the wisdom of BATF's conclusion that "[i]n the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown." 51 Fed. Reg. at 20,481. The brand name is the most prominent and eye-catching component of wine labels. *E.g.*, "NAPA RIDGE" (PA¹⁴ 190-201 & 214-221); "NAPA CREEK WINERY" (PA 202-205); "RUTHERFORD VINTNERS" (PA 206-213). Less prominent on most of the Napa Ridge labels is the language "Coastal Vines" which is sometimes affixed regardless of whether the grapes are from the coast, from Napa (*e.g.*, PA 220) or entirely outside Napa (*e.g.*, PA 219). Still less prominent is the varietal designation (*e.g.*, white zinfandel (PA 219)). Appellations of origin such as Central Coast (PA 214), North Coast (PA 216), Lodi (PA 213), Stanislaus County (PA 206), or Napa Valley (PA 220) also appear on the front label, although many consumers may not understand the nomenclature or the geography involved.

¹⁴ Respondents will adopt petitioners' citation "PA" to refer to the petitioners' Appendix to the Petition for Writ of Mandate in the California Court of Appeal.

The Legislature held open hearings and took testimony in June and August, 2000, from numerous witnesses, including representatives of NVVA the California Retailers Association, Family Wine Makers of California, wine retailers, winery owners, and petitioners and their counsel. RA 1-17. Comments were received on behalf of wine producers, retailers, the Napa County Board of Supervisors, restaurants and others. (*E.g.*, RA 182, 198, 299, 301, 308, 320, 322, 324, 331.) The California Supreme Court observed:

Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results presented at the hearings disclosing consumer confusion relating to such labels.

App. 4a-5a, n.5.

B. No Distinction Between Inherently And Potentially Misleading Speech Confers First Amendment Protection On Deceptive Marketing

Petitioners rely on a host of inapposite cases that address facially accurate speech that nonetheless carries a potential to mislead, in which case supplemental disclosure is customarily favored over suppression. *E.g.*, *Ibanez v. Florida Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 138 (1994). Bronco invites this Court to depart from its own precedents and to insulate even patently deceptive commercial speech from regulation unless it is "incapable

of being presented in a way that is not deceptive." Pet. 26. It would be the rare case indeed where the deceptive import of commercial speech was "incapable" of being counteracted with sufficiently drastic and onerous countermeasures. But this Court has never suggested that the First Amendment is equally protective of truthful speech, on the one hand, and misleading speech coupled with a contradictory disclaimer, on the other. Any such rule would effectively disenfranchise the States from exercising authority in an historically settled domain of their police power, namely the protection of consumers from commercial deception and exploitation.

C. BATF Made No Findings That Bronco's Subject Labels Are Not Misleading As To Origin

Bronco argues that the California Court of Appeal failed to appropriately defer to supposed "findings" by the BATF (a) that all misdescriptive geographic brand names that are grandfathered are not misleading, and (b) that all COLAs embody the same individualized determination. Bronco then proceeds to argue that if the California Legislature's "contrary" findings are credited, one would inevitably be led to the conclusion that BATF abdicated its statutory obligations under the FAA Act. These contentions are untenable.

Preliminarily, in assessing a First Amendment commercial speech challenge to a state statute, it is far from clear why any Court would owe "deference" to a federal agency's factual "finding" over a contrary "finding" of the state legislature that passed the statute, particularly where, as here, the history of the subject industry features concurrent federal and state regulation. As the California

Supreme Court concluded, "We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry." App. 71a.

In any event, the findings that Bronco attributes to BATF are entirely illusory. BATF's regulatory history leaves no doubt that BATF believes that a geographic brand name of viticultural significance denotes the origin of the wine – quite the opposite conclusion than Bronco suggests. 51 Fed. Reg. at 20,481. Thus, misdescriptive brand names are disallowed and the modern rule forbids their use irrespective of any supplemental disclosure including as to appellation of origin. 27 C.F.R. § 4.39(i)(1). BATF could not rationally have concluded that while all such brand names are categorically misleading, all those in use before July 7, 1986, magically, are not. Bronco can cite no specific determination that each pre-July 7, 1986 label was not misleading.

Nor do individual COLAs embody any such determination. The Santa Rita Hills rulemaking comments did no more than emphasize that while the BATF conducts a case-by-case review to see whether any other information on the label contributes to misleading consumers, including as to the origin of the product, federal law permits the brand name itself, if grandfathered, to still be used. 66 Fed. Reg. 29,476 (May 31, 2001). Indeed, there is no known case in which a COLA application has ever been refused on the ground that the grandfathered geographic brand name itself is misdescriptive as to origin.

Finally, Bronco suggests that the California Court of Appeal implicitly assumed that BATF "routinely disregards its statutory duty" to act to prevent consumer deception. No such assumption informs the Court's opinion, nor, as a general matter, has any party challenged the wisdom or validity of the grandfather clause as a matter of federal law. In a system of federal and state co-regulation wherein "the BATF has long contemplated that the states will enforce their own stricter labeling requirements,"¹⁸ California's conclusion that local concerns justify a stricter regulation respecting wines bearing the name of its most prestigious grape-growing region neither supports nor depends upon any inference that BATF has abdicated its responsibilities.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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¹⁸ App. 57a.

No. 05-653

Supreme Court, U.S.
FILED

DEC 22 2005

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

**BRONCO WINE COMPANY and
BARREL TEN QUARTER CIRCLE, INC.,**

Petitioners,

v.

**JERRY R. JOLLY, Director of the Department of
Alcoholic Beverage Control; DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL, and the
NAPA VALLEY VINTNERS ASSOCIATION,**

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of California**

**BRIEF OF AMICI CURIAE 62 WINERIES
IN SUPPORT OF PETITIONERS
[Wineries Listed On Inside Cover]**

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This brief in support of Petitioners is filed on behalf of the following Amici Curiae:

<u>Winery</u>	<u>County</u>	<u>State</u>
Abundance Vineyards	San Joaquin	California
Amwell Valley Vineyard, Inc.		New Jersey
Bargetto Winery	Santa Cruz	California
Bartlett Maine Estate Winery		Maine
Brookmere Winery		Pennsylvania
Cayuga Ridge Estate Winery		New York
Chateau Diana	Sonoma	California
Chateau Grand Traverse		Michigan
Chateau Julien Wine Estate	Monterey	California
Chicama Vineyards		Massachusetts
Cimarron Cellars LLC		Oklahoma
Claudia Springs Winery	Mendocino	California
Coulson Winery	El Dorado	California
Dreyer Sonoma Winery	Sonoma	California
Fenn Valley Vineyards		Michigan
Four Chimneys Farm Winery		New York
Glenora Wine Cellars, Inc.		New York
Gold Ridge Pinot	Sonoma	California
Habersham Vintners, Inc.		Georgia
Heck Cellars	Kern	California
Hill Crest Vineyard		Oregon
Hoodspoor Winery, Inc.		Washington
Icaria Creek Winery	Sonoma	California

Kelsey See Canyon Vineyards, Inc.	San Luis Obispo	California
Kenwood Vineyards	Sonoma	California
Korbel Champagne Cellars	Sonoma	California
La Buena Vida Vineyards		Texas
Lake Sonoma Winery, Inc.	Sonoma	California
Las Vinas Winery, Inc.	San Joaquin	California
Latah Creek Winery, Ltd.		Washington
Latcham Granite, Inc.	El Dorado	California
Leelanau Wine Cellars, Ltd.		Michigan
McDowell Valley Vineyards	Mendocino	California
Mendocino Hill Winery	Mendocino	California
Mill Creek Vineyards	Sonoma	California
Mount Bethel Winery		Arkansas
Mount Palomar Winery	Riverside	California
Mountain View Vintners	Santa Clara	California
North Salem Vineyard, Inc.		New York
Old Mission Winery		Michigan
Paraiso Vineyards	Monterey	California
Perdido Vineyards		Alabama
Premium Vintners dba Fallbrook Winery	San Diego	California
Qualia, Thomas, dba Val Verde Winery		Texas
Rabbit Ridge Vineyards and Winery	San Luis Obispo	California
Robert Hall Winery	San Luis Obispo	California
Santa Cruz Mountain Vineyard	Santa Cruz	California



Santa Fe Vineyards		New Mexico
Saucelito Canyon Vineyard	San Luis Obispo	California
Sebastiani, Don	Sonoma	California
Shenandoah Vineyards, Inc.		Virginia
Sierra Vista Vineyards & Winery, LLC	El Dorado	California
Sonoita Vineyards, Ltd.		Arizona
Sonoma Creek Winery	Sonoma	California
Sonoma-Cutrer Vineyards	Sonoma	California
Sproul, David C., dba Chatfield Winery	San Joaquin	California
Tennessee Valley Wine Corp.		Tennessee
Valley of the Moon Winery	Sonoma	California
Weibel Incorporated	San Joaquin	California
Wiederkehr Wine Cellars, Inc.		Arkansas
Williamsburg Winery Ltd.		Virginia
Windemere Winery	San Luis Obispo	California

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INTEREST OF AMICI CURIAE¹

Sixty-two respected wineries representing eighteen states have joined together to present this brief to the Court in support of the Petition for Certiorari filed by Petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. Amici oppose the decision of the California Supreme Court reversing the California Court of Appeal and ruling that Section 25241 of the California Business and Professions Code is not preempted by federal labeling regulations. Amici further oppose the California Supreme Court's denial of review of the California Court of Appeal's ruling that wine labels that comply with federal labeling regulations, and that bear federal approval, can be "inherently misleading" and afforded no First Amendment protection. Amici strongly urge this Court to grant the Petition for Certiorari because Amici, and potentially every other winery in the United States, stand to be harmed by at least two likely results of the California Supreme Court's decision: (1) the enactment of further inconsistent labeling regulations, and (2) the erosion of First Amendment protection for commercial speech.

Amici are core members of the wine industry, from large wineries in California to small and medium-sized wineries across the United States which make wine and grow grapes. Wines produced by Amici are sold to consumers in the United States and throughout the world under a uniform system of national labeling rules developed for the interstate

¹ The brief was filed with the written consent of all parties, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amici state that no party or counsel to any party authored any portion of this brief, nor did any person or entity, other than Amici and their counsel, make a monetary contribution to the preparation or submission of this brief.

and foreign wine markets. Under this system, all wine industry members currently have a voice in national labeling regulations through the inclusive federal rulemaking process. If the uniform and inclusive federal regulatory system is subject to override via special interest legislation at the state level, the federal system will deteriorate and be replaced by a patchwork of rules sponsored (as in the case below) by politically connected special interest groups. Moreover, if courts are permitted to ignore findings by the federal labeling authorities that specific, federally approved brand names are not inherently misleading, protected commercial speech will lose valuable First Amendment protection, to the detriment of the Amici and consumers.

Amici's ability to continue to offer wines to the consuming public under geographic brand names that have been used for decades without consumer confusion or regulatory problems may be directly affected by this case. Therefore, Amici unite to submit this brief so that the Court has the benefit of the perspective of winemakers from throughout the United States when making the critical decision about whether or not this case should be heard. The livelihoods of Amici, and of thousands of other small wineries, stand to be affected by the Court's decision.

SUMMARY OF ARGUMENT

The federal government has closely regulated the alcoholic beverage industry, and wine labeling, in particular, for nearly a century. In 1935, Congress enacted the landmark Federal Alcohol Administration Act ("FAA Act"), which *inter alia* perfected federal control over the interstate wine markets. See 27 U.S.C. §201, *et seq.* The FAA Act directed the Treasury Secretary to enact regulations that would protect wine consumers from deceptive labeling practices and, as a

further protection, prohibited the interstate sale of wines unless the producer first obtained a federal Certificate of Label Approval ("COLA"). See *id.* §205(e) & (f). Pursuant to this mandate, and drawing on a prior extensive federal wine labeling code,² the Alcohol and Tobacco Tax and Trade Bureau ("TTB") promulgated comprehensive regulations governing the labeling of wines and implemented the COLA system for wine labels.³ See, e.g., 1 FED. REG. 83, 86 (Apr. 1, 1936) & 3 FED. REG. 2092, 2096 (Aug. 26, 1938); see also 27 C.F.R. Parts 1, 4, 9, 12, 13, 16 & 24 (current federal wine labeling regulations); see generally *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 16 (D. Ky. 1977) (discussing historic federal regulation of wine labeling and TTB's jurisdiction in the field).

The American wine industry – including Respondent Napa Valley Vintners Association ("NVVA") – long has viewed TTB as "for all practical purposes, . . . the sole agency under which the wine industry ha[d] operated since repeal." Letter from NVVA President Jack L. Davies to BATF Director Rex D. Davis (Feb. 23, 1976).⁴ However,

² A then newly formed federal agency known as the Federal Alcohol Control Administration adopted a regulatory code for wine labeling following the repeal of prohibition. These regulations were preceded by three decades of active federal oversight of wine labeling by other federal agencies, including the Food & Drug Administration and the Federal Trade Commission.

³ The TTB is the recent successor to the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The opinions below refer collectively to both agencies as the BATF. Amici follow Petitioner's lead by hereinafter referring to both agencies as the "TTB."

⁴ Amici Motion for Judicial Notice at Exh. B ("Amici MJN"). Amici filed a Motion for Judicial Notice in the case before the California Supreme Court, which motion was granted. Therefore, documents referred to herein as exhibits to "Amici MJN" are part of the record below.

in 2000, the NVVA petitioned the California Legislature to, in effect, overrule one aspect of the federal regulations – the 1986 provision authorizing wineries to use “grandfathered” geographic brands with wines made from grapes grown in a variety of regions. See 27 C.F.R. §4.39(i)(2)(ii).⁶

This grandfather provision had operated without controversy since its promulgation. In 1999, however, the Bronco Wine Company (“Bronco”) purchased the grandfathered “Napa Ridge” wine brand, which had for many years been produced by an NVVA member, Beringer Wine Estates, with grapes grown outside Napa County. The purchase of the brand by Bronco (not an NVVA member) prompted the NVVA to draft state legislation that purported to “close a loophole” in federal law by banning the use of grandfathered brands that referred to Napa County or federally recognized “viticultural areas” within Napa County unless the wine qualified for the Napa County appellation of origin.

The NVVA claimed that such legislation was urgently required to protect consumers from deceptive labeling practices, although virtually identical labels had been used in commerce for more than fifteen years by an NVVA member without causing any apparent consumer confusion. The Legislature enacted the NVVA’s legislation with only minor changes, and the Governor signed it into law. See CAL. BUS. & PROF. CODE §25241.

⁶ A wine brand is said to be “grandfathered” if it was contained on a COLA issued before July 7, 1986, the date the current federal regulation governing the use of brand names of viticultural significance was published as a final rule. Section 4.39(i) limits the appellations of origin with which a grandfathered brand may be used and, together with other provisions, requires that the appellation of origin appear clearly and conspicuously on the label.

Section 25241 purports to override the federal grandfather provision and to negate federally-issued COLAs. The California Legislature enacted this law based on its "finding" that Bronco's labels deceived consumers, even though those same labels, which contain conspicuous appellations of origin and other disclosures, have been found *not* to be misleading by expert federal regulators and even though similar labels had been used by Beringer for many years without incident or objection. Moreover, Section 25241 does not treat purportedly misleading brands equally. Instead, it allows NVVA members to continue using labels bearing brand names referring to AVAs within Napa County (such as Oakville, Rutherford, and Stags Leap District) on wines that do not meet the appellation requirements for these areas, as long as the wines qualify for the much broader Napa County appellation. Surely if Bronco's "Rutherford Vintners" label is misleading when used with wines from outside the Rutherford AVA, then a "Stag's Leap Wine Cellars" label is equally misleading when used with wines from outside the Stag's Leap District AVA.

Bronco argues that Section 25241 is preempted under established Supremacy Clause precedents: a State cannot prohibit what the federal government specifically authorizes, by regulation or by express license. Bronco also argues that the Court of Appeal incorrectly defined its established geographic brands as being "inherently misleading" and therefore denied them the commercial speech protections of the First Amendment. This amici brief makes three complementary points. *First*, Section 25241 undermines the strong federal interest in uniform wine labeling regulations. Wine labeling traditionally has been regulated almost exclusively by the TTB, with the States playing a decidedly subordinate role. To fulfill this central regulatory role, TTB has promulgated comprehensive, uniform national wine

labeling rules and reviewed and approved tens of thousands of proposed wine labels. State legislation that creates special labeling rules for single counties undermines the uniform federal labeling scheme, improperly destroys valuable federally-issued COLAs, and risks introducing greater complexity and confusion into wine labeling.

Second, Section 25241 impairs the strong federal interest in preserving established brand names and trademarks. While the California Supreme Court and the Court of Appeal portray the grandfather clause as an anomaly (*see, e.g.*, Petitioner's Appendix ("Pet. App.") A, 49a-57a; Pet. App. B, 89a-90a), it in fact reflects TTB's consistent policy of protecting well-established, approved labels when regulating geographic terminology. The same policy underlies the approach taken by both federal regulators and Congress in addressing "geographically misdescriptive" marks under federal trademark law. Federal policy in each of these areas has recognized that established brands enjoy recognition in the marketplace that new brands do not – and that rules appropriate to new brands and marks should not be applied retroactively to established ones unless a less onerous alternative would be ineffective. Section 25241 contravenes this policy: it nullifies established brands despite TTB's conclusion that such destruction is unnecessary to protect consumers.⁶

⁶ A partial list of brands owned by Amici and other wineries that are vulnerable to special interest legislation like Section 25241 includes: Amwell Valley Vineyard, Bargetto Winery, Bartlett Maine Estate Winery, Brookmere Winery, Cayuga Ridge Estate Winery, Chateau Grand Traverse, Chateau Julien Wine Estate, Chicama Vineyards, Cimarron Cellars, Coulson Winery, Dreyer Sonoma Winery, Fenn Valley Vineyards, Four Chimneys Farm Winery, Glenora Wine Cellars, Habershara Vintners, Hill Crest Vineyard, Hoodsport Winery, Kenwood Vineyards, Korbé Champagne Cellars, La Buena Vida Vineyards, Lake Sonoma
(Continued on following page)

Third, the Court of Appeal failed to consider decisions of this Court distinguishing between “inherently” and “potentially” misleading speech, and also ignored fundamental trademark principles and contrary findings by federal labeling regulators, to the net effect that established geographic brands will be improperly denied the First Amendment protections rightfully afforded to commercial speech.

ARGUMENT

I. SECTION 25241 IMPAIRS THE LONG-STANDING NATIONAL POLICY FAVORING UNIFORM AND CONSISTENT FEDERAL WINE LABELING REGULATIONS.

American wines from every region are sold to consumers throughout the country pursuant to the “national rules” established by TTB “governing the distribution, production, and importation of alcohol.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995). This system of *national* rules is vital to the continued success and growth of the U.S. wine industry. American wineries rely on the system, and spend substantial sums promoting approved wine brands and building consumer recognition and goodwill. *See, e.g., Cabo Distrib. Co., Inc. v. Brady*, 821 F. Supp. 601, 609 (N.D. Cal. 1992).

Winery, Latah Creek Winery, Leelanau Wine Cellars, McDowell Valley Vineyards, Mill Creek Vineyards, Mount Bethel Winery, Mount Palomar Winery, North Salem Vineyard, Perdido Vineyards, Santa Cruz Mountain Vineyard, Santa Fe Vineyards, Saucelito Canyon Vineyard, Shenandoah Vineyards (VA), Sierra Vista Vineyards & Winery, Sonoita Vineyards, Sonoma Creek Winery, Tennessee Valley Wine Corp., Val Verde Winery, Valley of the Moon Winery, Wiederkehr Wine Cellars, Williamsburg Winery, and Windemere Winery.

TTB's regulations promote uniformity in regulation by affording identical protections to each and every American viticultural area and by imposing identical restrictions on the use of geographic brand names. This approach ensures fair competition between and among wines from different regions: wines succeed or fail based on attributes like taste, quality, and value, and not because the law favors wines from a particular growing region.⁷ The uniform federal approach also benefits consumers because, in the absence of such national labeling rules, consumers would be confronted with a multiplying array of state and local wine labeling schemes that would impose additional unnecessary costs on wineries, raise consumer prices, and invariably create consumer confusion.

The centralized COLA process also helps to promote national uniformity in wine labeling by ensuring that proposed labels are consistently reviewed by expert Labeling Specialists. American wineries rely on the COLA system. *See, e.g., Cabo Distrib. Co.*, 821 F. Supp. at 609. Indeed, in part because wineries rely so heavily on COLAs, the courts have held that COLAs, like other licenses, create important property interests that cannot be taken away without due process. *See id.*

The NVVA has acknowledged the need for uniform federal regulation of wine labels. When the NVVA in 1976 urged the TTB to retain responsibility for establishing appellations of origin, it contended that centralized federal oversight of the appellation process was necessary to

⁷ The uniform approach taken by the federal rules has helped to spur a tremendous expansion in the domestic wine industry. There were over 3,700 wineries in the U.S. in 2004 and every state now hosts at least one commercial winery. *See* www.wineamerica.org (listing wineries).

ensure “uniform[ity] for all states so that all rights and interests are treated equally.” NVVA President Jack Davies, “Position of the Napa Valley Vintners” (Feb. 8, 1977).⁸

The NVVA also was concerned that states would enact conflicting laws, “thereby adding ambiguity in the eyes of the consumer and possibly unfair advantages to certain growers or wineries.” *Id.* A year later, the NVVA sounded the same theme, contending in a public statement that “*wine labels should be uniform in their regulation from one wine growing region of the United States to another.*” *Id.* (emphasis added).

Section 25241 accords Napa County wines special status and unique protections purportedly because consumers hold Napa County wines in uniquely high regard. See CAL. BUS. & PROF. CODE §25241(a). But, with due respect to Napa County, there are countless premium wine growing regions across the country that produce high-quality, award winning wines that are prized by consumers and critics alike. Wines from the Sonoma Valley, Monterey, and Mendocino AVAs in California all command premium prices, as do wines from the Willamette Valley in Oregon, the Yakima Valley in Washington, and other premium wine growing regions throughout the country. The same rationale that the Department and the NVVA have invoked to justify Section 25241 could as easily justify special labeling rules for wines made in any other appellation areas. This potentiality is not speculative, because every major appellation of origin in California, among other states, is well-represented by successful and popular brands grandfathered under 27 C.F.R. §4.39(i)(2)(ii).

⁸ Amici MJN at Exh. C.

For this reason, a ruling permitting Section 25241 to stand will inevitably destroy the uniform wine labeling regulations that now exist as a matter of federal law. As the NVVA recognized a quarter of a century ago, allowing the states to enact wine labeling rules that conflict with federal regulations will create consumer confusion and increase barriers to interstate commerce in wine. This will result in a labyrinth of inconsistent wine labeling requirements that will damage the domestic wine industry and "mushroom into labeling chaos for the wine consumer." Robert Benson, *Regulation of American Wine Labeling: In Vino Veritas?*, 11 U. C. DAVIS L. REV. 115, 154 (1978). "The better solution, in a nation where every region's wines are purchased by consumers throughout the country, is to encourage a strong federal system of wine labeling rules." *Id.* Even some of those who support the Napa-centric California law concede that federal labeling regulations are the appropriate means of addressing purported consumer confusion. See Michael Maher, Comment, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CAL. L. REV. 1881, 1924 (2001) (concluding that "[t]o ensure consistency in wine labeling and to minimize consumer confusion and dilution of regional place names, regulatory reform is needed at the federal level.")

Unlike the state or local government legislators, TTB can balance the interests of consumers and the wine industry on a national scale, without placing undue weight on the views of a well-financed and politically connected trade association of local producers. Moreover, the TTB regulatory process gives every winery and grape grower an equal voice and an equal opportunity to make its case for regulatory change. That process also ensures that regulatory change will come, if at all, only upon the conclusion of a formal federal rulemaking by expert regulators, and not

as the result of *ad hoc* state or local legislative initiatives. In short, the forum in which to debate a Napa-only exception to the grandfather provision is the federal rulemaking process, not a state legislature.⁹

II. SECTION 25241 IMPAIRS THE CONSISTENT FEDERAL POLICY PERMITTING THE CONTINUED USE OF ESTABLISHED BRANDS.

A. The Importance Of Established Wine Brands.

As Amici know well from their own extensive experience, wine brands play an important role in the distribution of wine, and wineries invest heavily to promote their brands. Because established brands are valuable business assets, federal policies favor their preservation and protection. Section 25241 frustrates these policies by effectively destroying established brands without adequate justification.

American wines have long been sold under brand names; in fact, under the regulations, wine labels *must* include a brand name. See 27 C.F.R. §4.32. TTB has recognized that brands thus play a "significant" role in the marketing of wines. 64 FED. REG. 2,122, 2,125 (Jan. 13, 1999). Wine brands also play a central role in consumer purchasing decisions. Indeed, particularly in the market for "value" wines – those costing \$14 or less – a familiar brand name is the single most important factor consumers consider

⁹ The federal regulatory process ensures broad participation in formulating wine labeling rules. TTB's proposed rulemakings are published in the *Federal Register*; affected parties, including the entire wine industry and consumers alike, have an opportunity to submit comments and to influence the regulatory process; and final rules can be challenged as arbitrary or capricious in court by any affected persons. See, e.g., *Wawzshkiewicz v. Dept. of the Treasury*, 480 F. Supp. 739, 741 (D.D.C. 1979) (consumer challenge to TTB wine labeling regulations).

when purchasing wine. Simply put, consumers buy wine brands that they know and like. Wineries therefore expend substantial time, energy, and money familiarizing consumers with their brands and attempting to establish brand loyalty. *Cf. Pete's Brewing Co. v. Whitehead*, 19 F.Supp.2d 1004, 1012-13 (W.D. Mo. 1998) (discussing the importance of brand names in the beer industry); *Cabo Distrib. Co.*, 821 F. Supp. at 609 (discussing development and importance of brand names in liquor industry).

For these reasons, established brand names are "very valuable" business assets, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 286 (1988), which have long been protected by federal and state trademark law. See 15 U.S.C. §1051 *et seq.*; CAL. BUS. & PROF. CODE §14200 *et seq.* The law has long recognized that established brand and trade names should not be destroyed "if less drastic means [would] accomplish the same result." *Siegel Co. v. Fed. Trade Comm'n*, 327 U.S. 608, 612 (1946) (quoting *Fed. Trade Comm'n v. Royal Milling Co.*, 288 U.S. 335, 337 (1933)).

The federal grandfather clause reflects these established policies. TTB, in its 1986 rulemaking, specifically declined to adopt a restrictive geographic brand name rule with respect to established brands because it concluded that less drastic measures – namely, an appellation of origin requirement – would suffice to protect consumers. See 51 FED. REG. 20,482.

This conclusion had ample support in the rule-making record. For example, NVVA member Spring Mountain Winery argued that TTB should not restrict the use of the "Spring Mountain" brand (even though it is typically not used with wines made from grapes grown in the "Spring Mountain AVA") because the winery had "a proprietary right to the name" and the wine's label featured an appellation of

origin that sufficed to dispel any potential for consumer confusion. See Bronco Appendix (Cal. Supreme Ct.) at 400-01 ("Bronco App."). Another NVVA member, Monticello Vineyards, explained that consumers would not be confused by the continued use of its geographically misdescriptive brand name because it had "established a high-quality, well-known label under [the] Monticello Cellars' name" and had "developed a following for [its] wines and labels." Bronco App. at 403. Given the brand's established reputation, Monticello Vineyards argued that consumers would not be confused about the origin of its wines, particularly since the label included an appellation of origin. See *id.* In contrast to the balance struck by TTB when it adopted 27 C.F.R. §4.39(i)(2)(ii), Section 25241 disregards the importance of established brands by ignoring less drastic consumer protection measures, such as enhanced appellation disclosures or similar measures, that would adequately protect consumers, and instead adopts requirements that will unnecessarily destroy established national wine brands.

B. Section 4.39(i) Is Consistent With TTB's General Approach To Geographic Terminology.

The federal grandfather clause reflects TTB's consistent approach to the regulation of geographic terms on wine labels. For example, 27 C.F.R. §4.39(j) permits the use of "product names of geographic significance," provided the appropriate TTB officer finds that, because of their long usage, such names are recognized by consumers as fanciful product names and not representations as to origin. Similarly, TTB allows use of certain varietal designations containing geographic terms (like "French Colombar") because of their longstanding use to designate

the grape, rather than the region of origin of the wine. See 61 FED. REG. 522, 527 (Jan. 8, 1996).

In these instances, *as with grandfathered geographic brand names*, TTB permits use of the geographic term but requires a true appellation of origin to appear on the label. Thus, many wineries, including members of the NVVA, routinely use such geographic designations for wines that do not originate in the place named, without occasioning any claims of consumer deception.

The treatment of "semi-generic" geographic designations (*e.g.*, Champagne, Chablis, and Burgundy) further illustrates the consistency of the federal approach. The TTB has permitted the use of semi-generics on wines not originating in the named place because their geographic meaning is deemed not to be primary. *Id.* §4.24. At present, those semi-generics can be used on U.S. wine labels, provided they are accompanied by an appellation of origin. *Id.* Beginning in 2006, pursuant to a new agreement between the U.S. and the European Community ("US/EC Agreement"), sixteen of the most contested semi-generic geographic names will no longer be permitted on wine labels emanating from outside the specified geographic region.¹⁰ US/EC Agreement, Title III, Art. 6. However, the prohibition will apply only to new uses of the semi-generic geographic names. U.S. producers using

¹⁰ The Agreement Between the United States of America and the European Community on Trade in Wine ("US/EC Agreement") was agreed to in principle by the European Commission and the United States in September 2005 and is slated to take effect in 2006. The semi-generics affected are Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay. US/EC Agreement, Annex II. A copy of the current draft version of the US/EC Agreement can be found at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0547en01.pdf

the terms on federally approved wine labels *before* the effective date of the US/EC Agreement will be allowed to continue using them under a grandfather clause. *Id.* ¶ 2.¹¹

The use of "grandfathering," or a substantial "sunset" period (which has the same effect, at least for a while) is a common approach by TTB in introducing a change in labeling regulations based on a perceived potential for consumer confusion. For example, in adopting the rule regarding geographic product names, TTB not only allowed for continued use of established names having secondary meaning, but also provided for a five-year phase-in period for the rule. 27 C.F.R. §4.39(j); *see* 43 FED. REG. 37,671, 37,675 (Aug. 23, 1978); *see also* 27 C.F.R. §§4.35, 4.35a (including phase-in periods for requirements regarding name and address of bottler or importer); *id.* §4.28(e) (including ten-year phase-in period for rule prohibiting use of the misdescriptive term "Gamay Beaujolais"); 62 FED. REG. 16479, 16483-84 (Apr. 7, 1997). Indeed, the recognition of the Napa Valley AVA itself involved grandfathering producers whose wines were made from grapes grown outside the Napa River watershed but who had misdescriptively used the "Napa Valley" designation

¹¹ In the protracted negotiations leading to the US/EC Agreement, the U.S. government has consistently resisted the European Community's efforts to protect its geographical indications for wine and spirits, to the extent that such protection would come at the expense of long-standing U.S. trademarks. Section 25241 stands for precisely the opposite proposition – that established geographic brand names can be eviscerated in the name of protecting the Napa Valley as a geographic source. On that basis, Section 25241 violates the Supremacy Clause. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 & 381 (2000) (invalidating Massachusetts law that interfered with the federal government's ability to "speak for the Nation with one voice in dealing with other governments" and left the executive branch with "less to offer and less economic and diplomatic leverage as a consequence").

on their labels for some time. See 46 FED. REG. 9,061, 9,062 (Jan. 28, 1981). The federal grandfather provision is thus consistent with TTB's policy of protecting, when possible, established labeling terms that have become accepted in the marketplace.

C. Section 4.39(i) Also Comports With Congressional Policy Regarding Geographic Trademarks.

The grandfathering provision not only comports with TTB's general regulatory approach, but it also is consistent with the approach taken by federal trade negotiators and Congress in addressing the identical issues under federal trademark law. Traditionally, federal trademark law recognized that a geographically "misdescriptive" mark was not inherently misleading. Thus, a mark that was "primarily geographically deceptively misdescriptive" of the goods could nevertheless be registered as a federal trademark if the mark "ha[d] become distinctive of the applicant's goods in commerce," that is, it possessed "secondary meaning." See 15 U.S.C. §1052(e)(2), (f) (1992); 1 J. Thomas McCarthy, *McCarthy on Trademarks* §5.10. Such marks could be registered for the same reason that TTB permits the continued use of established geographic brands under Section 4.39(i) – namely, because consumers come to associate such marks with the producer of the goods, not the geographic reference in the mark. See 2 McCarthy §14.30. "With the acquisition of secondary meaning, the geographic term takes on a new meaning denoting the trademark owner as source." *Id.* §14.9.¹³

¹³ At the same time, "deceptive" marks were not registerable or protectable. See 15 U.S.C. §1052(a) (1992); *id.* (2000). The distinction
(Continued on following page)

In recent years, the United States has negotiated and entered into several international trade treaties in which the issue of harmonizing trademark rights and geographical indications has featured prominently – specifically, the North American Free Trade Agreement (“NAFTA”) and the multi-lateral agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) pursuant to the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”). In those negotiations, other nations strongly advocated for blanket rules prohibiting the use or protection of trademarks containing recognized geographical indications if the product originated somewhere other than the place indicated. The United States negotiators, representing the consensus view of U.S. industry, resisted such blanket rules, on the ground that they were unnecessary for consumer protection and could deprive brand owners of the equity in their brands. In both instances, a compromise was forged that proscribed the use and protection of *new* geographically misdescriptive marks, but ensured the right to continue to use and protect *existing* marks, even if geographically misdescriptive. See North American Free Trade Agreement, Article 1712(5) (1995); Agreement on Trade-Related Aspects of Intellectual Property Rights, Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs & Trade, Article 24(5) (1994).

between merely “misdescriptive” marks (which are protectable) and “deceptive” marks (which are not) was *materiality* – that is, whether consumers cared about the geographic origin of the goods. If the geographic origin was material to consumers of the relevant goods, a misdescriptive mark was deceptive and therefore unregistrable; if the origin was not material, the same mark was registrable upon proof of secondary meaning. See 2 McCarthy §14.39.

Congress, in turn, amended U.S. trademark laws to conform to these international agreements. In those amendments, Congress imposed new restrictions on the use of "geographically misdescriptive" trademarks, including trademarks for wine or spirits, but *adopted grandfathering rules designed to protect established trademarks*. Thus, amendments made in 1993 to conform the Lanham Act to the requirements of the North American Free Trade Agreement changed the prior law to prohibit the registration of "primarily geographically deceptively misdescriptive" marks, but the amendments expressly permit registration of a mark "which became distinctive," i.e., had achieved secondary meaning, before the effective date of the amendment. 15 U.S.C. §1052(e)(3), (f) (2000). Likewise, a subsequent amendment made pursuant to the multilateral agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") bars registration of a mark that contains "a geographical indication for wines or liquor [that] identifies a place other than the origin of the goods," but only if the mark was "first used . . . on or after" the grandfathering date of January 1, 1996. 15 U.S.C. §1052(a) (2000); 1 McCarthy §5.10; 2 McCarthy §14.40.

As this discussion shows, both general federal policy and international law favor the use of grandfathering to permit the continued existence of established geographic trademarks, in part because such established marks have developed secondary meanings and thus are not likely to deceive consumers and in part because recognized brands cannot readily recover lost brand equity when an intervening change in law renders that brand effectively unusable. Section 25241, in distinct contrast, destroys established brands and makes no allowance whatsoever for their secondary meaning. Section 25241 thus frustrates federal policy by disregarding established principles of trademark

law, and by effectively destroying brands that are not deceptive to consumers.

III. THE COURT OF APPEAL'S ERRONEOUS HOLDING THAT ESTABLISHED GEOGRAPHIC BRAND NAMES ARE INHERENTLY MISLEADING MAY UNFAIRLY DESTROY AMICI'S BRAND NAMES.

The Court of Appeal failed to properly consider this Court's decisions distinguishing between "inherently" and "potentially" misleading speech. See Petitioner's Petition for Writ of Certiorari ("Pet. Brief"), 23-24. As a result, it ruled that any geographic brand name "more likely to deceive the public than to inform it . . . is inherently misleading and its use may be prohibited." Pet. App. A., 83a. In order to reach its fallacious conclusion that established geographic brand names are inherently misleading, the Court of Appeal necessarily ignored findings of this Court post-dating the *Central Hudson* case,¹³ disregarded contrary findings by the TTB, and abandoned the entire concept of "secondary meaning," which is a basic tenet of trademark law, see 15 U.S.C. §§1052(e)(2)-(3), (f) (1992).

Many of the Amici own well-established geographic brands which have long been used legally and without consumer complaint. Amici's brands, like those of Petitioner, convey not a geographic source but rather a particular quality and reputation associated with the producer (i.e., they have developed "secondary meaning"). Moreover, Amici's wine labels communicate accurate and non-misleading information about the source of the wine,

¹³ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); see Pet. Brief, 23-24.

as they are required to under federal law. See 27 C.F.R. §4.39(i)(2)(iii). Therefore the "inherently misleading" designation as applied by the Court of Appeal is both legally and factually incorrect.

The Court of Appeal's decision would permit state legislatures to ban Amici's brands merely by passing legislation similar to Section 25241. Further, the Court of Appeal's holding puts Amici at risk by providing grounds for an argument that Amici's brands constitute unfair competition. Competitors could seek to destroy the equity built up in established geographic brand names on the ostensible ground that Amici's labels are unfair because they are "inherently misleading." The far-reaching negative repercussions of this erroneous holding are quite troubling to Amici.

CONCLUSION

Amici urge the Court to accept Petitioners' Petition for Certiorari and reverse the decisions below. The special interest statute that is at the heart of this case is fundamentally inconsistent with the regulatory foundation upon which the United States wine industry is built and the statute should not be permitted to stand.

DATED: December 22, 2005

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No. 05-653

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IN THE
Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER
CIRCLE, INC.,
Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of
Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY
VINTNERS ASSOCIATION,
Respondents.

*On Petition For A Writ Of
Certiorari To The Supreme Court Of California*

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Pursuant to Rule 15.8 of the Rules of this Court, Petitioners file this Supplemental Brief to bring to the Court's attention an "intervening matter not available at the time of the party's last filing."

One of the principal issues presented by the Petition is the applicability and scope of the exception to the "presumption against preemption" recognized in *United States v. Locke*, 529 U.S. 89 (2000). See Pet. 21-23; Pet. Rep. Br. 7-8. Since the filing of the reply brief in support of the Petition, Petitioners have learned that the very same issue is before the Court in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371, which is set for oral argument on January 18. There, as here, the Respondents argue that, despite a history of federal regulation dating back (at least) to the 1930's, the presumption against preemption applies because state regulation supposedly pre-dates federal involvement. Compare Brief for Respondents, No. 04-1371, at 30, with NVVA Opp. 24. Indeed, the Respondents in *Dabit* rely on the very same passage from *Locke* that the California Supreme Court cited in holding that the presumption against preemption is only dispelled if federal regulation has been "manifest since the beginning of our Republic." Compare Brief for Respondents, No. 04-1371, at 29, with Pet. App. 37a. n.42 (both citing *Locke*, 529 U.S. at 99).

Accordingly, although Petitioners continue to believe that their petition should be granted for all the reasons set forth in the petition and reply, the Court should at the very least hold the petition pending the decision in *Dabit* and then remand the case to the California Supreme Court in light of that decision.

DATED: January 17, 2006.

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**A. THE CALIFORNIA SUPREME COURT'S
PREEMPTION HOLDING SQUARELY
CONFLICTS WITH SETTLED LAW.**

Respondents deny any conflict between federal law and California's Section 25241, asserting that the "overriding purpose" of both is to prevent consumer deception in labeling of alcoholic beverages. NVVA Opp. 15; *accord* Dept. Opp. 13. But as this Court has repeatedly held, even when federal and state law have a common goal, state law is preempted if it "interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)); *accord* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (the "fact of a common end" does not entitle a state to use "conflicting means" to achieve that end); *see* Pet. 15.

In the exercise of its lawful authority to promulgate uniform "national rules" governing the labeling of alcohol, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995), TTB chose to regulate potentially misleading grandfathered geographic brand names, not by prohibiting them outright, but by expressly authorizing their use *if* accompanied by certain additional disclosures. *See* 27 C.F.R. §4.39(i)(2)(ii); 51 FED. REG. 20,480, 20,482 (June 5, 1986). TTB then issued scores of label-specific Certificates of Label Approval ("COLAs") authorizing Petitioners to use the labels at issue in this case in interstate commerce after reviewing them "on a case-by-case basis to determine whether any particular label is likely to mislead consumers, including as to the origin of the product." 66 FED. REG. 29,476, 29,478 (May 31, 2001). The California statute eviscerates the carefully crafted federal grandfather clause and nullifies these COLAs, trampling individual rights expressly granted by federal law and frustrating the indisputable federal interest in maintaining a uniform system of "national rules." *Coors Brewing Co.*, 514 U.S. at 480. The California Supreme Court's decision upholding that statute, in turn, squarely

conflicts with numerous decisions of this Court invalidating state laws that ban conduct specifically authorized by federal laws, regulations, or other regulatory grants of permission. Pet. 11-16. Further, that decision invites each of the 50 states to override TTB's regulatory judgments whenever they see fit.

Respondents protest that the grandfather clause cannot be construed as a "license to mislead." NVVA Opp. 15. Precisely so: the grandfather clause authorizes use of labels that the agency has concluded are *not* misleading. On this point, there can be no serious dispute: TTB's conclusion that an appellation of origin or "some other statement" could "dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine" is stated explicitly in the regulation. 27 C.F.R. §4.39(i)(2)(iii). Indeed, as Respondents concede, TTB could not lawfully have adopted the grandfather clause *unless* it had concluded that the provisions adequately met the agency's statutory obligation to regulate so as to "prevent consumer deception." 27 U.S.C. §205(e); *see* Dept. Opp. 22. If Respondents believed that the grandfather clause violated TTB's statutory mandate, they should have challenged the regulation under the Administrative Procedure Act rather than procuring a conflicting state statute.

Contrary to Respondents' contentions, the mere brevity of the discussion of the agency's reason for the grandfather clause does not obscure or undermine the rule's preemptive force. First, an agency's background intent in adopting a regulation is irrelevant to preemption analysis where, as here, the regulation is unambiguous in scope and effect and the conflict with state law is clear. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000). In any event, TTB's statement of purpose succinctly confirms that the grandfather clause was intended to "provide industry with sufficient flexibility in designing their labels, while at the same time *providing consumers with protection* from any misleading impressions that might arise from the use of geographic

brand names.” 51 FED. REG. at 20,482 (emphasis added); *see also id.* at 20,481 (noting evidence that geographic brand names had developed significant following among consumers who understood that the brand names did not identify the wine’s origin).

Echoing the California Supreme Court’s distinction “between (1) not making an activity unlawful, and (2) making that activity lawful,” App. 64a, Respondents contend that TTB intended Section 4.39(i)—and, indeed, all of its regulations and COLA requirements—merely as a set of “minimum standards,” which the states could supersede with stricter rules. NVVA Opp. 17. But whatever may be the case with certain other labeling provisions, neither the explicit text of Section 4.39(i) nor its regulatory history indicates that the agency intended to permit states to outlaw the very brand names that the regulation specifically sought to preserve in the marketplace.¹ Rather, the regulation and its history reveal the agency’s particular desire to avoid “having a whole class of brand names become totally unusable.” 49 FED. REG. 19,330, 19,332 (May 7, 1984).

¹Respondents cite another federal regulation that specifically contemplates that states may regulate certain aspects of winemaking. NVVA Opp. 5 (citing 27 C.F.R. §4.25a). No party has suggested that the use of *brand names* is covered by this regulation, and it is not. *See* App. 152a. Likewise, nothing about TTB’s January 1986 comment regarding Oregon’s “more stringent” wine rules suggests any intent that its subsequently-adopted geographic brand rule be merely a “minimum standard.” *See* NVVA Opp. 5-6 (citing 51 FED. REG. 3773, 3774 (Jan. 30, 1986)). As for Respondents’ assertion that TTB did not “take into account local conditions” affecting the use of specific brand names when it adopted Section 4.39(i) and therefore would condone state “supplementation” of its regulation, NVVA Opp. 7; *see* Dept. Opp. 11, it goes without saying that, to create an effective system of “national rules” (*Coors Brewing Co.*, 514 U.S. at 480), TTB necessarily had to ignore parochial interests in favor of 50-state uniformity. That fact, if anything, underscores the conflict posed by Section 25241’s piecemeal exception to the federal rule.

Ultimately, the various theories by which the California Supreme Court and Respondents attempt to conjure away the conflict between California's Section 25241 and TTB's Section 4.39(i) fail. That conflict is virtually indistinguishable from the conflicts repeatedly found by this Court to be preemptive, from *Gibbons v. Ogden* to *Ray v. Atlantic Richfield Co.* and beyond. See Pet. 12-13. To characterize Section 4.39(i) as a non-preemptive "minimum standard" would create a novel exception that would swallow the settled rules of implied preemption.

In short, the federal regulation at issue reflects the considered judgment of TTB to authorize the continued use of certain brands on the basis that they are not incurably deceptive. Even if California's Section 25241 shares the consumer-protection goal of federal alcohol labeling law, that statute "interferes with the methods by which the federal statute was designed to reach this goal" and hence is preempted. *Int'l Paper Co.*, 479 U.S. at 494. The California Supreme Court's decision upholding that statute squarely conflicts with this Court's settled approach to conflict preemption and invites a patchwork of conflicting state labeling laws that would heighten, rather than dispel, consumer confusion and impair, rather than promote, interstate commerce in alcoholic beverages.

**B. THE CALIFORNIA SUPREME COURT'S
INDISPUTABLE RELIANCE ON THE
PRESUMPTION AGAINST PREEMPTION
CANNOT BE RECONCILED WITH DECISIONS
OF THIS COURT AND COURTS OF APPEALS.**

Respondents' suggestion that the "presumption against preemption" was unnecessary to the California Supreme Court's decision, (NVVA Opp. 19), is wishful advocacy, to put it charitably. The California Supreme Court's reliance on the presumption was explicit and unequivocal. Indeed, the court devoted the vast majority of its opinion to analyzing whether the history of state and federal alcohol

regulation warranted application of the presumption (App. 11a-59a), at the conclusion of which the court stated (App. 59a):

Having concluded that Bronco has failed to carry its burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the [TTB], to preempt the traditional exercise of state police power such as the wine labeling regulation found in section 25241, we proceed under the presumption that no such preemption was intended. We bear this presumption in mind when we consider below Bronco's assertion that section 25241, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.

By imposing, in a case of conflict preemption, a "burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the [agency]" in order to avoid a "presumption against preemption," the California Supreme Court's decision conflicts with decisions of this Court and the Fifth and Eleventh Circuits. See *Geier*, 529 U.S. at 884 ("[T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."); Pet. 16-21 (discussing appellate cases).

Respondents cite *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985), and *New York v. FERC*, 535 U.S. 1 (2002), for the proposition that "this Court has [not] refused to apply the presumption against preemption in cases involving a claim of implied conflict preemption." NVVA Opp. 21. In *Hillsborough*, a pre-*Geier* case, this Court referred to a "presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." 471 U.S. at 716. This statement is not an endorsement of a broad

presumption against preemption in all conflict cases,² nor does it posit any burden of proving clear or manifest intent on the part of Congress or a federal agency in order to avoid such a presumption. As for *New York v. FERC*, that case did not “concern the validity of a conflicting state law or regulation.” 535 U.S. at 18. Rather, the case addressed a predicate question of whether a federal statute did or did not authorize *any* federal regulation in a field that had been under the jurisdiction of the states.

Respondents similarly fail in their effort to harmonize the California Supreme Court’s decisions with holdings of the Fifth and Eleventh Circuits. See Pet. 17-19. The Fifth Circuit’s decision in *Planned Parenthood of Houston & Southeast Texas v. Sánchez*, 403 F.3d 324 (5th Cir. 2005), addressed the very narrow category of joint federal-state benefits programs, in which “[w]e start with ‘a presumption that the state statute is valid.’” *Id.* at 336 (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661 (2003)). Even at that, however, the Fifth Circuit made clear that “a state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.” *Id.* at 337. That is precisely the situation here: the state’s “eligibility standard” for use of geographic brand names “altogether excludes” brands that are authorized under federal law. As for the Eleventh Circuit cases cited by Respondents, those are inapposite because they involved either *field* preemption, see *Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113, 1124-31 (11th Cir. 2004), or *express* preemption, see *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327-28 (11th Cir. 2001). None of those cases considered the question of whether to apply the presumption to a conflict between federal and state law or

²As Respondents have conceded, no question of health or safety is posed by the labeling practices here. See App. 14a n.13.

whether to require evidence of preemptive federal intent to avoid such a presumption.³ The conflict in the case law over those questions calls for resolution by this Court.

Finally, even if the presumption against preemption were not categorically inapplicable in a case of clear conflict, Respondents concede, as they must, that under *United States v. Locke*, 529 U.S. 89 (2000), the existence of a “federal presence” in a regulatory field may preclude application of the presumption against preemption. See NVVA Opp. 24. Respondents do not specifically address the substantial confusion in the case law regarding the extent and duration of the “federal presence” necessary to trigger *Locke*, but they do at least concede, contrary to the decision below, that the “presence” need not date back to the “beginning of our Republic.” Respondents further acknowledge that some federal appellate courts have applied the *Locke* exception in cases involving regulatory schemes enacted contemporaneously with, or well after, enactment of the Federal Alcohol Administration Act. See cases cited at Pet. 22. While Respondents vaguely assert that the California Supreme Court properly construed and applied *Locke*, they do not attempt to square the court’s ruling with those federal appellate decisions, nor do Respondents explain why, if the federal presence need not date back to the “beginning of our Republic,” the court below felt compelled to look for precisely such a hoary “presence.”

This is not a case in which the federal government has just entered a regulatory field long occupied exclusively by

³ Respondents erroneously assert that the Eleventh Circuit decisions rejecting the presumption against preemption in cases of federal-state conflict were “expressly abrogated” by this Court’s decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). Although the specific holding of *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), was overruled by *Sprietsma*, this Court did not address the Eleventh Circuit’s views regarding the inapplicability of the presumption in conflict-preemption cases.

the states. Rather, the federal regulatory scheme—and even the *specific federal regulation at issue*—substantially predate the state statute under scrutiny. Neither law nor logic supports the application of the presumption against preemption in a case, like this, where a *recently-enacted* state law conflicts with a *well-established* federal rule adopted as part of a longstanding federal regulatory regime. If the Court has any doubt on this score, it should invite the Solicitor General to submit a brief expressing the views of the United States on the recurring and important issues of the scope and applicability of the *Locke* exception.

C. THE LOWER COURT'S HOLDING THAT BRONCO'S BRANDS ARE "INHERENTLY MISLEADING" CREATES A CONFLICT THAT WARRANTS REVIEW

Respondents attempt to portray the decision below as merely applying "the well-settled principle that false and misleading speech is not protected by the First Amendment." NVVA Opp. 25. Tellingly, however, Respondents never address the erroneous standard employed by the court below in determining that the brands and labels at issue are unprotected—namely, whether they are "more likely to deceive the public than to inform it." App. 83a. Necessarily, therefore, Respondents fail to resolve the conflict between the decision below and the decisions of this and other courts employing a very different analytic approach.

Instead, Respondents merely assert, repeatedly, that "Bronco's brand names convey objectively false information." NVVA Opp. 25. Contending that the cases in which speech has been deemed *potentially* misleading rather than *inherently* misleading "all involved attempts to convey accurate information," Respondents conclude that the speech at issue here is beyond the scope of the First Amendment. *Id.* at 27. Contrary to Respondents' argument, however, this Court has not framed the distinction between inherently and potentially misleading speech in the binary terms of "objectively false" versus "accurate." In fact, the distinction

arises precisely because speech may have more than one connotation, and its truth or falsity may depend on the context or the audience or both.

For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985), this Court found it “self-evident” that “substantial numbers” of people would be deceived by an attorney’s advertisement that “fees” would be due only in the event of a recovery, because clients would not understand that “costs” were distinct from “fees” and would be due regardless of the outcome. Nevertheless, the Court held that the advertising was only potentially misleading because the deception could be cured by a disclaimer. *Id.* Similarly, as discussed in the Petition, a number of appellate courts have held that even demonstrably confusing or misleading speech cannot be suppressed absent a showing that mandatory disclosures cannot dispel consumer deception. *See* cases cited at Pet. 26; *see also* *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) (state could not bar unlicensed persons from holding themselves out as “psychologists”; “danger” that consumers “will be misled” outweighed by First Amendment preference for “more disclosure, rather than less”); *Johnson v. Collins Entm’t Co.*, 564 S.E.2d 653, 666 (S.C. 2002) (offer of video “jackpots” above statutory limit would mislead consumers “unless clarification is provided”).

As the federal agency charged with regulating wine labeling concluded in the case of grandfathered geographic brands, an appellation of origin or “some other statement” is “sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.” 27 C.F.R. §4.39(i)(2)(iii). The agency correctly recognized what Respondents and the court below ignore, namely, that a brand name, even a geographic one, acquires, over time, significance as an indicator of a single source of the branded goods. *See* Pet. 25 n.14; *see also* Brief of 62 Wineries as Amici Curiae in Support of Petitioners at 16-19. In precisely this manner, Bronco’s brands, over their long period of use, have come to be associated with a single

source of the wines, and not as geographic indications. *See* Pet. 25 n.14. Unless additional disclosures would be wholly ineffective in curing any residual geographic confusion that the brands may cause, the brands and labels cannot be deemed *inherently* misleading. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *see also, e.g., Pearson v. Shalala*, 164 F.3d 650, 654, 658 (D.C. Cir. 1999) (health claims on dietary supplements could not be banned even where not supported by "significant scientific agreement" unless potential for deception could not be cured through additional labeling).

Here, the Legislature and the Court of Appeal, and now Respondents, simply assumed without analysis that additional disclaimers would not cure any vestigial deception arising from Bronco's brands and labels. Pet. 26-27. The decision below thus ignores the analytic framework established by this Court for determining when speech may be prohibited outright and when a state may only require additional disclosures and, in the process, deepens the confusion in the lower courts over that question. Accordingly, review is plainly warranted.

CONCLUSION —

The petition should be granted.

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Respectfully submitted,

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